Supreme Court, U. S.
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No. 74-1553

In the

Supreme Court of the United States

OCTOBER TERM, 1974

DR. W. D. WILKEY,

Appellant,

vs.

THE ILLINOIS RACING BOARD, ANTHONY SCARIANO, Chairman, RAY FRANK, LUCY REUM, PATRICIA HEWITT, SIDNEY HYMEN,

Appellees,

and

THE ILLINOIS STATE RACING STEWARDS, TED ATKINSON, Chief Steward, HENRY HAUER, Steward, PETE BATTLE, Steward,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

MICHAEL B. COHEN
100 N. LaSalle Street
Chicago, Illinois 60602
726-0739

GEORGE C. PONTIKES
Counsel for Appellant

Assisted by Robert A. Loeb,
Law Student-DePaul University

The Scheffer Press, Inc.—(312) 263-6850

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IN THE

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No.

DR. W. D. WILKEY,

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vs.

THE ILLINOIS RACING BOARD, ANTHONY SCARIANO, Chairman, RAY FRANK, LUCY REUM, PATRICIA HEWITT, SIDNEY HYMEN,

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Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Dr. W. D. Wilkey, appellant, appeals from an opinion of a Three Judge Court in the United States District Court for the Northern District of Illinois, Eastern Division, entered on March 12, 1975, denying appellant's motion

for preliminary injunction. In so ruling and dismissing Plaintiff's complaint, the Three Judge Court found Illinois Racing Board Rule 322 not to be violative of the Fourth and Fourteenth Amendments to the United States Constitution (See Appendix A)

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Three Judge Court for the Northern District of Illinois, Eastern Division, is not reported. For the convenience of the court, appellant has attached hereto, as portions of the Appendix, copies of the complaint, answer, entry of a temporary restraining order and extension thereof entered by Judge Bauer[1], memoranda of law, and transcript of the oral argument which sets forth the reasoning of the decision of the Three Judge Court as well as the notice of appeal (See Appendix, sections B, C, D, E, F, G and H).

JURISDICTION

This suit was brought by appellant under 28 U.S.C. Sections 1343 (3), (4) and Sections 2201 and 2202; 42 U.S.C. Section 1983; and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

The suit was brought by the appellant, challenging the Constitutionality of Rule 322 of the Illinois Racing Board which provides for authorization and implementation of

[1] Judge Bauer was the District Court Judge to whom this case was assigned. This case was transferred to Judge Kirkland because of Judge Bauer's appointment to the 7th Circuit Court of Appeals.

warrantless personal searches, and for revocation of one's license upon refusal to consent to said warrantless search.

A notice of appeal to this Court was filed on April 1, 1975. This Court's appellate jurisdiction is invoked under 28 U.S.C. 1253, providing for direct appeal from decisions of three-judge courts.

TEXT OF RULE

Rule 322 reads as follows:

Inspections and Searches Amended November 13, 1973.

a) The Illinois Racing Board or the State Steward investigating for violations of law or the rules and regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, *in order to inspect and examine the personal effects or property on such persons* or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as

aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule shall have his license revoked.

b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

QUESTION PRESENTED

Is an administrative rule, which requires a veterinarian to consent to a warrantless personal search as a condition of his employment, and where the veterinarian's failure to consent to said search results in revocation of his license, violative of the 4th, 5th and 14th Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments IV, V, XIV.

STATEMENT

On December 6, 1974, appellant filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division, against members of the Illinois Racing Board and the Illinois State Stewards (Appendix C). The complaint alleged that the appellee stewards suspended plaintiff's veterinary license without a hearing and that said suspension was done pursuant to a rule of the Illinois Racing Board which was violative of the Fourth, Fifth, and Fourteenth Amendments to the United

States Constitution since the rule required revocation of the doctor's license if he refused to be searched.

Plaintiff also prayed for a preliminary injunction, enjoining the appellees from suspending his veterinary license, and for a declaratory judgment that Rule 322 of the Illinois Racing Board was unconstitutional in that it violated the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Plaintiff also sought compensatory and punitive damages. On December 20, 1974 Judge Bauer granted plaintiff's motion for a temporary restraining order and on December 30, 1974 entered an extension, with findings of facts and conclusions of law (App. D & E).

Plaintiff's complaint alleged in essence that he was approached by several agents and was told to empty his pockets. He refused. He was then taken to the State Steward who informed him of Illinois Racing Board Rule 322. The Steward asked plaintiff if he (plaintiff) would allow a search of his person. Plaintiff refused. Plaintiff's license was then suspended. The defendants admitted plaintiff's allegations.

The Three Judge Court of the Northern District of Illinois, Eastern Division, was convened, and briefs (See Appendix Sections F & G) were filed by respective parties. The panel heard arguments and ruled from the bench on March 12, 1975. The court denied appellant's motion for preliminary injunction and found Rule 322 not to be violative of the Constitution. Further they dismissed appellant's complaint.

THE QUESTION IS SUBSTANTIAL

The court below held that Rule 322 of the Illinois Racing Board was constitutional. During the course of its

oral opinion which declared Rule 322 to be constitutional the Chief Judge made the following observation:

> "That the principle and rationale of Colonnade and the Biswell cases, decided by the Supreme Court of the United States, are controlling; that the fact that one dealt with a liquor dealer's regulation and the other a gun dealer's regulation and this deals with the regulation of horse racing, that there is a difference without any distinction. We feel those two cases are applicable and that they control our decision leading us to say that this rule is constitutional and is not subject to the attack to which it has been subjected in this lawsuit.
>
> Now I will ask Judge Austin if he has any wish to supplement my statement.
>
> JUDGE AUSTIN: I have nothing to add and I concur in what you just said, Chief.
>
> JUDGE SWYGERT: Judge Kirkland?
>
> JUDGE KIRKLAND: I will merely say that in my opinion, as I read the Supreme Court cases that touch upon this subject, my opinion is that Rule 322 does not violate any provision of the Federal Constitution." (App. A, p. 15a)

The Three Judge Court was in error when it stated that in this case there is a difference without a distinction. The court failed to properly analyze the rule involved in the instant case as opposed to the federal regulations involved in Colonnade and Biswell.

The appellant readily agrees that horse racing is a regulated industry; however, the Court below failed to recognize that some reasonable constraints should be placed on the scope and exercise of the rule in question. In *U.S.* v. *Biswell,* 406 U.S. 311 (1972), there was a Federal statute authorizing official entry during business hours of any firearms or ammunitions dealer for the purpose of inspecting or examining (a) any records or documents

required to be kept, and (b) any firearms or ammunition kept or stored by such dealer. There were some reasonable constraints in that case; the rule was strictly limited to inspecting records or documents *required* to be kept by federal regulation and was further limited to firearms or ammunition.

It is interesting to note in the Government's Summary of Argument to this Court (*U.S.* v. *Biswell,* No. 71-81) how the issue was framed. The Government stated, "Whether Congress may, consonant with requirements of the Fourth Amendment, adopt a warrantless inspection procedure directed at the firearms and required business records of a licensed gun dealer. We contend that Congress has that authority where, as here, it enacts an inspection statute narrowly limited in time, location, and scope." Here, the rule allows agents of the Illinois Administrative Body to inspect and examine the personal effects or property on such persons. There is absolutely no limitation. It is an outright general search of the person.

It is also interesting to note that in *Biswell* the federal agents procured a search warrant *after* they observed and seized two sawed-off rifles.

The rule in Biswell has a greater utility in that when the agent finds unlicensed guns, it is evidence of unlawfulness; it is all the Government needs to know. This is not true in the instant case since Dr. Wilkey, being a licensed veterinarian is not only allowed to carry drugs, but the very nature of his occupation demands it.

The Constitutional requirement that a warrant issue only upon probable cause and that it particularly describe the place to be searched and the persons or things to be

seized was designed to eliminate the pernicious general warrant. *Weeks* v. *United States,* 232 U.S. 383, 390-392 (1914).

Further, Dr. Wilkey was threatened with a personal search, which if refused would result in revocation of his license under the rule in question. The attempted intrusion by the State (Illinois Racing Board), here, is certainly severe. As this Court noted in *Terry* v. *Ohio,* 392 U.S. 1, 24-25 (1967), "even a limited search of outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."

In the two (2) cases involving administrative rules concerning warrantless searches, *Camara* v. *Municipal Court,*[2] 387 U.S. 523, 87 S.Ct. 523 (1967) and *See* v. *Seattle,* 387 U.S. 541, 87 S.Ct. 1737 (1967) your Honors held that administrative searches by Municipal Health and Safety inspectors of private houses and commercial structures were presumptively unreasonable if conducted without a warrant. Further that administrative searches *of property* constitute intrusions upon interests protected by the 4th Amendment.

Your Honors in responding to the argument that the police powers of the State in regulating the health, safety morals is dependent upon the enforcement of the rule and should prevail responded as follows:

> "But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant" *Camara* v. *Municipal Court,* 387 U.S. 527, 533, 87 S.Ct. 1727, 1733).

[2] *Camara* overruled *Frank* v. *Maryland,* 359 U.S. 360 even though the ordinance in *Frank* unlike the rule of the Illinois Racing Board was hedged with safeguards in that there was a general reasonableness requirement in *Frank.*

It would seem that an individual should be entitled to as much if not more protection from unreasonable searches of his person than his property.

The ultimate issue to be decided in this case is the reasonableness of the search provided for in Rule 322. "The most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions' *Katz* v. *U.S.,* 389 U.S. 347, 357 (1967). The exceptions are 'jealously and carefully drawn,' *Jones* v. *U.S.,* 357 U.S. 493, 499 (1958), and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.' *McDonald* v. *U.S.* 335 U.S. 451, 456 (1948). 'The burden is on those seeking the exemption to show the need for it.' *U.S.* v. *Jeffers,* 342 U.S. 48, 51 (1951)." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 454-455 (1970).

In the instant case if agents of the Illinois Racing Board had probable cause to believe that appellant was committing a crime they either could have procured a warrant or if they reasonably believed he was in the process of committing a crime they could have arrested him and searched him pursuant to that arrest.

Appellee's and the District Court's reliance on *Colonnade Catering Corporation* v. *United States,* 397 U.S. 72 (1970) is not controlling in this situation. Appellee has conceded that the statutory language involved in *Colonnade sufficiently* limited the scope of the search (See Appendix G

61a), and there are no such limitations in Illinois Racing Board Rule 322. Further in addition to the broad historical authority that the *Federal Government* has had in regulating the liquor industry for over 200 years, the federal agent in *Colonnade* was present at a party on the petitioner's premises when he noted a possible violation of federal law. It is highly doubtful that either in *Biswell* or *Colonnade* the federal agents could have searched the person of the individuals involved.

There is certainly nothing more inherently evil about the horse racing industry than the insurance industry, transportation industry or any of the many other "highly regulated" industries. Industries aren't evil although some people within the industry may be. What is left of the Fourth Amendment if a personal search is allowed in which the prosecutor (the Racing Board) and the prosecutor alone determines to make a personal search, with or without probable cause, and a refusal to consent to said search results in revocation of one's license.

Appellant believes that a substantial question has been presented on his behalf as well as numerous other professional and non-professional people. To sanction possible future abuses so serious as to potentially deny the protection of the Fourth and Fifth Amendments to citizens employed in any regulated or administrative area could present potentially devastating results inimical to a free society.

CONCLUSION

It is submitted that the Three Judge Court has misconstrued this court's opinions in *Colonnade* and *Biswell*. We believe that the question presented by this appeal is substantial and that it is of public importance.

Respectfully submitted,

MICHAEL B. COHEN
GEORGE C. PONTIKE
Attorneys for Appellant

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

DR. W. D. WILKEY,

Plaintiff,

v.

THE ILLINOIS RACING BOARD, ANTHONY SCARIANO, Chairman,

RAY FREARK, LUCY REUM, PATRICIA HEWITT, SIDNEY HYMEN;

Defendants,

and

THE ILLINOIS STATE RACING STEWARDS, TED ATKINSON, Chief Steward, HENRY HAUER, Steward, PETE BATTLE, Steward,

Defendants.

No. 74 C 3524

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Luther M. Swygert, Judge, United States Court of Appeals, Seventh Circuit; the Hon. Richard B. Austin and the Hon. Alfred Y. Kirkland, Judges, United States District Court, Northern District of Illinois, Eastern Division, in Judge Kirkland's courtroom, in the United States

Courthouse at Chicago, Illinois, on Wednesday, March 12, 1975, at the hour of 2:00 o'clock, p.m.

Mr. Michael B. Cohen
100 North LaSalle Street
Chicago, Illinois,
appearing for the Plaintiff;

Ms. Jewel N. Klein
160 North LaSalle Street
Room No. 1000
Chicago, Illinois,
appearing for the Defendants.

3 The Marshal: The Hon. Luther M. Swygert, United States Circuit Judge for the Seventh Judicial Circuit, the Hon. Richard B. Austin and the Hon. Alfred Y. Kirkland, United District Court Judges for the Northern District of Illinois. Hear ye, Hear ye, Hear ye, the Hon. Three-Judge Court is in session, pursuant to notice.

Please be seated.

The Clerk: 74 C 3524, Dr. W. D. Wilkey v. The Illinois Racing Board, et al., hearing on constitutionality of certain ordinances.

Judge Swygert: Would counsel announce who they are and who they represent.

Mr. Cohen: Michael Cohen, representing the plaintiff, your Honor.

Ms. Klein: Jewel Klein, for The Illinois Racing Board.

Judge Swygert: Before we start, I think we ought to lay down some ground rules as to the length of argument.

All three of us, Judge Austin, Judge Kirkland and I, are acquainted with the issues and the problem that this case presents. It seems to us that there will be no need

for protracted argument. Time is of some essence, because both Judges on either side of me have cases that are going forward. While I realize each case is of importance and has to be given proper attention —

4 Judge Austin: May I suggest ten minutes to a side?

Judge Swygert: I was going to suggest ten minutes.

Mr. Cohen: I will be no longer than seven or eight minutes.

Judge Swygert: We know what the case is about. Very good, you may proceed.

Opening Argument On Behalf Of Plaintiff
By Mr. Cohen.

May it please the Court, there has been one new theory injected in this lawsuit. To a certain extent, it is irrelevant, yet it serves to illustrate a point. That is, that the agents believed that they had probable cause. That belief stems from information received from the chief chemist, who stated that the subject may be administering amomorphine to horses. If Spinnelli and Aguillar are still the law, they are woefully lacking in their belief that there was probable cause. The point I was trying to make is that this determination has to be made by a magistrate or judge, not by an administrative body.

There are two frightening aspects to this case that I perceive:

One: The position of the Administrative Board, or the defendants in this case, where they state at Page 13 of their brief:

5 "Under the facts here, the suspension or revocation of the license is a clearly acceptable sanction. Un-

der the facts here, plaintiff was not put to any unfair choice of sanctions."

As I read Gardiner, Lefkovitz, those cases, when you are put into a situation where your license is revoked or you do not have a job for exercising a constitutional right, that is the type of coercion which is violative of the Fifth Amendment.

Judge Swygert: The Fifth Amendment, yes; but not necessarily the Fourth Amendment. I think that is going to be the distinction. This is not a Fifth Amendment situation where you are put to a choice of either incriminating yourself or getting discharged. This is simply a search and these cases in the Supreme Court—the Camara and Biswell case—certainly seem to be pretty close to the point, do they not?

Mr. Cohen: Well, Biswell and Camara; or the Biswell case and the liquor case and gun case, I do not believe—

Judge Swygert: They are not Fifth Amendment cases.

Mr. Cohen: No, they are not, your Honor. However, the position is, as I read those cases, when you put one in a coercive position where the person is given the choice of surrendering a constitutional right—I
6 read it in a little broader context.

Judge Swygert: Well, I know, but in those two cases there was no mention of the Fifth Amendment, as I recall.

Mr. Cohen: I believe Lefkovitz held—

Judge Swygert: I was talking of Camara. However, go ahead. I am using up a lot of your time.

Mr. Cohen: I believe we are living in a society which is thoroughly regulated and licensed.

Judge Swygert: That does not help us much, I am sorry to say. I agree with you. Maybe it is too much

so; but certainly horse racing has been well regulated for a long time, has it not?

Mr. Cohen: Not to my knowledge, with reference to the—

Judge Swygert: Well, at least it is one of the accepted regulated activities, I guess.

Mr. Cohen: The difference I see in this case and the liquor case and the gun cases is that we were dealing with an Act of Congress. Congress makes laws. They do not enforce laws.

Here we have an administrative body making the law and enforcing the law.

With reference to those two cases, Colonade and Biswell, both of the dealers in those areas are required to keep records pertaining to their business and have
7 those records open for inspection when duly authorized agents come in.

In this case, the rule of the Board is to inspect and examine the personal effects of property. It is not limited. There is no rule requiring the doctor to keep and maintain such records and the utility of the rule is not as great as in the two Supreme Court cases; because the doctor, being a licensed veterinarian, can carry prohibited drugs with him.

Judge Swygert: Well, assuming he does—I thought of your statement—but assuming that he does and it is legitimate: that he has reason to carry them—that does not mean that he is automatically suspended. He can explain it and that is all right. So there is nothing against having them. It is only that the rule requires him to be searched if they want to search him.

Mr. Cohen: But the rule says that if he does not submit to a search, his license is revoked.

Judge Austin: He knew that when he signed up, did he not?

Mr. Cohen: That gets into the question of a knowing waiver, an intelligent waiver, and a voluntary waiver. I do not know if he read each particular line when he signed the document; but he is put in this position: If he does not sign it, he is not given his license. If he does sign it—

Judge Swygert: He can practice other than at the racetrack, can he not?

Mr. Cohen: I assume if he wants to practice as an individual, treating dogs or cats, he can.

In the two Supreme Court cases, I believe you are dealing with a particular search. You find something in those cases, that gives the agents all they need to know. In particular, that you have to have guns which are registered and you have to have records which are subject to inspection.

In this case, it is a broad rule which authorizes a search.

Judge Swygert: Well, a search for certain things. If he were caught with some guns that were not registered, I suppose he could have those suppressed. It is not a general search. It is a search for a particular thing at a certain time and in a certain area.

Mr. Cohen: Well, the rule does not say that it is a search for a particular thing, your Honor. The rule says that they can inspect and examine the personal effects.

Judge Swygert: For drugs.

Mr. Cohen: It does not say for drugs in the rule.

Judge Swygert: Maybe not, though I thought that it did.

Mr. Cohen: My prayer is, not only on his behalf, but on behalf of everyone who is part of an industry

which is regulated—and there is a myriad of them —and they say, "Well, we are in this industry on behalf of the public interests." Then everyone is going to be subjected to having their Fourth Amendment rights licensed or regulated away.

Judge Swygert: Perhaps I have already asked too many questions, but there are two things:

One. You said his license was revoked. I got the idea from the pleadings that it was only a suspension. Is that right?

Mr. Cohen: Yes, that is right, a Steward's suspension. The rule says if you fail to consent to a search, your license shall be revoked.

Judge Kirkland: Did they not set a hearing for revocation, at which he did not appear? He failed to show up?

Mr. Cohen: That is correct. They scheduled a hearing. My dilemma was as follows: I filed this suit first. Am I to argue to the Administrative Board, "Look, we did not submit to the search, but it is unconstitutional."

I felt that a federal court is better equipped to interpret the Constitution than the administrative body.

Judge Kirkland: I take it the purpose of the suspension is to hold things in status quo until at a very early date there can be a hearing on revocation. He chose to pursue this course, which is certainly nobody's business, I do not think.

I do not think there has been a revocation.

Mr. Cohen: There may not be, but our position before the Board would be that we did fail to submit to the search; and based upon the rule, "his license shall be revoked."

Judge Swygert: I am not so sure how long this goes. It seems to me it is almost moot. Is he still suspended or not?

Mr. Cohen: Well, the Racing Board took the position the license is only good up until the end of '74. His dilemma was as follows: If there is a suspension, as there was in this case, and he goes to another track to practice, that track will follow the sister state's rulings. If he is suspended in Illinois, he is suspended throughout the country.

Judge Swygert: How long is that suspension? Is there not a time limit on that?

Mr. Cohen: The Stewards said his license is suspended. The position of the Board is, I guess, that it is only suspended for 30 days and then revoked. However, his dilemma is that he cannot practice anywhere.

Judge Kirkland: Your problem is removing that from his record?

Mr. Cohen: Absolutely.

11 Judge Kirkland: I assume but for that, the suspension—when his license expires, which it would regardless of this incident—the suspension would be moot except as to how it might affect his being licensed elsewhere or here again. Is that true?

Mr. Cohen: Here again. That is correct, your Honor.

When he moved to Hot Springs to practice, it was not the end of 1974 and they would not have granted the license, but for Judge Bauer's temporary restraining order, I do not believe.

Thank you.

Argument On Behalf Of Defendants

Judge Swygert: Will you help us out on these last questions, as to what the situation is presently on this man's license or its suspension?

Ms. Klein: The Racing Board rule, following the Horse Racing Act and the Harness Racing Act, is that the

Stewards have the power of suspension for the duration of the racing meeting, which is defined in our statute, plus 30 days. For reasons which I do not understand, the Stewards did not indicate that their suspension was to last beyond 30 days.

The ruling, which is, I believe, part of our amended answer, says:

"Dr. Wilkey's license is suspended.'

12 Now very often they say, "—for the duration of the meeting, plus 30 days."

They did not say "plus 30 days," but they said that it was suspended and referred to the Board for hearing.

Had that come before the Board, it would have been questionable as to whether they had intended it to last for 30 days or not. Unfortunately, this matter never came to the Board.

I was tempted to argue exhaustion of administrative remedies at this point. Thinking that perhaps you would not be receptive to that argument, I did not raise it in my brief. However, it is our position that had Dr. Wilkey come before the Board at the hearing that we scheduled for him, he could have said, "Well, now, I have been suspended for 10 days, or, 12 days, and that is enough."

While the rule provides, in mandatory language, that a license shall be revoked, the Board made that rule. The Board could have changed the rule at that point, had Mr. Cohen persuaded us that the rule was unconstitutional. Also, they could have imposed a lesser sanction.

They could have saud, "You are right. You have been suspended for 10 days. That is enough."

However, that issue was never presented to the Racing Board and there has been no revocation. The Stewards do not have the power to revoke a license.

13 Judge Swygert: I guess I should not pursue it. Is this going to be an impediment to his getting a new license? It is a yearly license, is it not?

Ms. Klein: That is correct.

Judge Swygert: Can he still apply?

Ms. Klein: Absolutely.

Judge Swygert: I mean, will he comply? Will he have any probem getting a license?

Ms. Klein: Well, the primary responsibility—

Judge Swygert: I mean, if it makes any difference? I am just curious, I guess.

Ms. Klein: The primary responsibility in a licensing situation is that of the Stewards. Technically, they do not have the power to grant licenses; but they receive the applications and recommend to the Board rejection or denial. I do not know how they would answer that question.

Judge Swygert: Well, I do not think that that is relevant anyway.

Judge Austin: The Steward's recommendation can be disregarded by the Board, is that right?

Ms. Klein: Absolutely. The Board has, on numerous occasions, overruled the recommendations of the Stewards.

I do not know if you want to count this as part of my ten minutes, but I would like to ask, firstly, whether or not you wanted argument from me now on my motion for a stay.

14 Judge Swygert: Let me ask you on that: Are you pressing that?

Ms. Klein: Well, let me apologize to the Court. Had I known about the Smith case prior to Friday, I would have brought that to the Court's attention. I have been the attorney at the Racing Board about three-and-a-half months now. The Chairman assigned me to handle this case, because it was 1983 and because it sued the Board members in their personal capacity. The Attorney General represents us normally and he has got that case.

It was really just a quirk that late Friday afternoon, my law clerk met another law clerk in the library that said, "Well, my gosh, we have already got that Rule 322 in court."

Judge Swygert: That does not prevent us from going ahead if we feel that abstention is not required.

Ms. Klein: That is correct, although I do think that under the doctrine of the Pullman case, this is a classic case.

Judge Swygert: Why is it? I mean, what can an Illinois case decide insofar as it relates to a constitutional question? Do you think that the statute is vague, or something, that the Illinois courts can narrow it or interpret it?

Ms. Klein: As I understand it, the plaintiff in the Smith case has challenged the power of the Board

15 to adopt the rule. It is a point which counsel here has conceded. If the Illinois court finds that we do not have the power to adopt the rule, and this Court in the meantime has ruled on this question, this Court has done, in effect, a needless thing.

It was on that basis that I filed the motion for a stay.

Judge Swygert: Very well, we understand you on that. Do you want to say something on the other?

Ms. Klein: Yes. I would like to ask you another question on procedural grounds.

When this complaint was filed challenging the constitutionality of a state-wide regulation, I filed a motion to

dismiss on the basis that plaintiff had failed to ask for a three-judge court.

He then came in and also filed an application for a three-judge court.

Now as I read 28 U.S.C. 2281, a three-judge court is appropriate in a case where there is an application for a preliminary and permanent injunction. I find myself now in a procedural box. There is no application on file for a preliminary and permanent injunction, other than the prayer for that relief in an unverified complaint.

Judge Swygert: Well, I suppose technically you
16 may be right; but it did not occur to me that they were not here—and under some kind of technical obligation for a verified complaint or whatever is required for a preliminary injunction.

They ask for it in their complaint.

Ms. Klein: That is right.

Judge Swygert: What is wrong with that? I mean, why does that not invoke a three-judge situation?

Ms. Klein: Because your power derives under 2281 in a situation where you are ruling—when you are deciding whether or not to issue an injunction. I was told by Judge Kirkland that we are here today to discuss the constitutionality of the rule on its face.

I have never had the opportunity to test the constitutionality of the rule, as applied. In a sense, I think we have put the cart before the horse. I am not worried about the constitutionality of this rule. I think that Rule 322 falls squarely within the doctrine of Colonade and Biswell, where the court said that a sanction was appropriate when there was a refusal.

Judge Swygert: That is all plaintiff has been arguing, as I understand it. The plaintiff is arguing that the statute is, on its face, unconstitutional. That is what I understood him to argue. He did not say that explicitly, but that was the import.

Ms. Klein: Yes, but we are not talking about
17 criminal law. We are talking about an administrative regulation, where this Court could find—

Judge Swygert: What point are you making? I would like to know what you think we ought to do. What do you want us to do?

Ms. Klein: Well, I think I am entitled to know whether or not there will be a hearing on a preliminary or permanent injunction.

Judge Swygert: We want your argument in answer to the gentleman representing the plaintiff here. That is all we are asking you to do now.

Ms. Klein: Well, my argument is there in my brief. The Colonade case says that an administrative agency can conduct a warrantless search in a situation where there is a heavily regulated industry, where there is a history of regulation—that is racing—where there is no expectation of privacy—that is racing—and where the rule is limited in time, place and scope.

The portion of my brief dealing with the time-place and scope regulation sets forth how those limitations are embodied in our rule. Neither Colonade or Biswell talk about probable cause. They talk about the social interests, as opposed to the private interests. Colonade, in a case that is practically on four squares with this one, said that sanction could be imposed when there was a fail-
18 ure to consent to an administrative search. In fact, the Colonade case is interesting because the dissent did not say there ought to be a warrant requirement in an administrative situation. What the dissent said was, "You ought to impose the penalty for refusing the search and get him for the violations of the law that you found when you made the search."

Now we did not do the search, so no search was accomplished in our situation. What we did was penalize for

refusing the search, and that is on four squares with the majority in Colonade.

Judge Swygert: Thank you.

Is there anything further?

Closing Argument On Behalf Of Plaintiff
By Mr. Cohen.

Just with reference to one comment that she made concerning discussing the rule, I called up and wanted to discuss this with them. They said they did not want to discuss the rule.

Judge Kirkland: I take it there is no question about the fact that the constitutionality of the rule under which they sought to search this man is what is before the Court now. There is no question about that, is there?

Mr. Cohen: That is correct. The can promulgate reasonable rules. My position is this is unreasonable.

19 (Whereupon, the three Judges conferred together, after which the following further proceedings herein were had; to-with:)

Judge Swygert: Thank you.

You may be seated.

We have consulted among ourselves, as you have noticed, and we are prepared to announce our judgment. I am going to invite my colleagues to supplement, if they wish, anything I have to say.

First, dealing with the question of the stay or abstention, it seems to me, at least—and my colleagues may have some other views or additional views as to that—but it seems to me that regardless of the fact that there is a state court case involving the same question, that this is not a classic case for abstention. The statute is plain. Apparently nobody has argued vagueness and the constitutional question is squarely before us; and it does not,

it seems to me, need any elucidation, narrowing or interpretation by the state courts before the Federal Court should look into it.

It seems to us, under those circumstances, there is no need to keep this case hanging or dangling, awaiting a decision by the state court which might go to the Supreme Court and so on.

We are prepared to announce our judgment on the merits and not abstain.

20 On the merits, we have concluded that Rule 322 is constitutional and is not subject to constitutional attack.

That the principle and rationale of Colonade and the Biswell cases, decided by the Supreme Court of the United States, are controlling: that the fact that one dealt with a liquor dealer's regulation and the other a gun dealer's regulation and this deals with the regulation of horse racing, that that is a difference without any distinction. We feel those two cases are applicable and that they control our decision leading us to say that this rule is constitutional and is not subject to the attack to which it has been subjected in this lawsuit.

Now I will ask Judge Austin if he has any wish to supplement my statement.

Judge Austin: I have nothing to add and I concur in what you just said, Chief.

Judge Swygert: Judge Kirkland?

Judge Kirkland: I will merely say that in my opinion, as I read the Supreme Court cases that touch upon this subject, my opinion is that Rule 322 does not violate any provision of the Federal Constitution.

I think the Court can take judicial notice that we all can recognize that racing is an industry that requires reasonable regulation. It is in the public interest to face squarely the problem of doping horses, the problem of

fixing races and all the problems that relate to that. I thing Rule 322 addresses that problem and addresses that problem in a reasonable manner, which is not violative of the Federal Constitution.

Judge Swygert: Thank you.

Ms. Klein: Would it be appropriate for me to move orally that this case be dismissed?

Judge Swygert: I cannot hear you.

Ms. Klein: Would it be appropriate for me to move orally at this time that this case be dismissed?

Judge Swygert: We will enter an appropriate order deciding the case. An appropriate order will be entered formalizing our decision and the parties will be furnished with a copy.

We stand in recess.

IN THE UNITED STATES DISTRICT COURT

* * (Caption — No. 74 C 3524) * *

CERTIFICATE

I, Roscoe C. Giles, Jr., do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings had in the above-entitled cause before the Hon. Luther M. Swygert, Judge, United States Court of Appeals, Seventh Circuit; the Hon. Richard B. Austin and the Hon. Alfred Y. Kirkland, Judges, United States District Court, Northern District of Illinois, Eastern Division, in Judge's Kirkland's courtroom, in the United States Courthouse at Chicago, Illinois, on Wednesday, March 12, 1975.

/s/ Roscoe C. Giles, Jr.
Official Court Reporter
United States District Court
Northern District of Illinois

APPENDIX B

SECOND
AMENDED COMPLAINT
JURISDICTION

1) Jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1343 (3) (4); Title 42 U.S.C. 1983; Title 28, U.S.C. Sections 2201 and 2202 and the 14th Amendment to the Constitution of the United States.

PARTIES

2) Ted Atkinson is presently the Chief Steward of the Illinois State Racing Stewards. Henry Hauer and Pete Battle are stewards. They were appointed by the Illinois Racing Board pursuant to statutory authority granted the Illinois Racing Board by Chapter 8, section 37 (S5), of Smith Hurd Illinois Annotated Statutes (Illinois Horse Racing Act).

3) Anthony Scariano is presently the Chairman of the Illinois Racing Board. Ray Freark, Lucy Reum, Patricia Hewitt and Sidney Hymen are members of the Illinois Racing Board. The Illinois Racing Board was created pursuant to Chapter 8, Section 37(a) of Smith Hurd Illinois Annotated Statutes (Illinois Horse Racing Act).

4) In doing the acts and things hereinafter set forth, said defendants were acting under the color of law.

5) Pursuant to the above statutes the Illinois Racing Board was vested with power to proscribe reasonable rules and regulations regarding horse racing meetings.

6) Rule 322 as promulgated by the Illinois Racing Board reads as follows:

Inspections and Searches Amended 11/13/73

a) The Illinois Racing Board or the State Steward investigating for violations of law or the rules and regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule shall have his license revoked.

b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule,

to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

7) On or about November 21, 1974 Plaintiff was approached by several I.B.I. Agents who told Plaintiff to "empty his pockets". Plaintiff refused. Plaintiff was then taken to Defendant Atkinson and another State Steward. Atkinson informed Plaintiff of Rule 322 and asked Plaintiff if he would allow a search of his person, Plaintiff refused.

8) On or about November 25, 1974, without a hearing, Plaintiff's veterinary license was suspended by the Illinois State Racing Stewards for his refusal to comply with Rule 322 and "his case" was referred to the Illinois Racing Board for any other action deeded appropriate". Pending such a hearing the Plaintiff is without his license and has had no hearing before any administrative or judicial body as to the Constitutionality or legality of defendant's acts.

9) Plaintiff has suffered and continues to suffer irreparable harm as the direct and proximate result of defendant's action. Plaintiff has no plain, adequate or complete remedy at law to redress the summary suspension of his license as well as his right to be free from unreasonable search and seizures without being subject to having his license revoked.

Wherefore, plaintiff prays for the following relief:

a) A preliminary injunction, enjoining the defendants from suspending his veterinary license;

b) After a hearing before this Honorable Court, a permanent injunction enjoining the defendants from suspending his license;

c) A declaratory judgment, holding that Illinois Racing Board Rule 322 is unreasonable and unconstitutional on its face and the rule also violates Plaintiff's rights under the 4th, 5th and 14th Amendments to the United States Constitution to be free from unreasonable searches and seizures as well as violative of the Illinois Constitution, Article 1, section 6, and further being unconstitutional in that said rule coerces plaintiff to forego his right to be free from unreasonable searches and seizures at the expense of loss of his license (job forfeiture);

d) Judgment against the defendants jointly and severally in the amount of $750,000;

e) Allow Plaintiff his costs herein including reasonable attorneys fees;

f) Grant such other and further relief as this court deems just and proper.

APPENDIX C

AMENDED ANSWER TO AMENDED COMPLAINT

1. Defendants and each of them deny each and every allegation of paragraph 1 of plaintiff's amended complaint.

2. Defendants and each of them admit each and every allegation of paragraph 2 of plaintiff's amended complaint.

3. Defendants and each of them admit each and every allegation of paragraph 3 of plaintiff's amended complaint.

4. Defendants and each of them admit each and every allegation of paragraph 4 of plaintiff's amended complaint.

5. Defendants and each of them admit each and every allegation of paragraph 5 of plaintiff's amended complaint.

6. Defendants and each of them admit each and every allegation of paragraph 6 of plaintiff's amended complaint.

7. Defendants and each of them admit each and every allegation of paragraph 7 of plaintiff's amended complaint.

8. Defendants, and each of them, deny each and every allegation of paragraph 8 of plaintiff's amended complaint and demand strict proof thereof.

9. Defendants and each of them deny each and every allegation of paragraph 9 of plaintiff's amended complaint.

Wherefore, defendants pray that judgment be entered in favor of the defendants.

FIRST AFFIRMATIVE DEFENSE

Now come defendants, and each of them, and as a first affirmative defense to plaintiff's amended complaint, state as follows:

1. That pursuant to the rules and regulations of thoroughbred racing, the thoroughbred stewards on November 22, 1974, issued Ruling No. 249, at Sportsman's Park, suspending the plaintiff for refusal to comply with the rules and regulations of thoroughbred horse racing, Rule No. 322, a copy of said ruling is attached hereto as defendants' Exhibit 1.

2. That Rule No. 236a thoroughbred racing states as follows:

> "If the stewards at any race meeting shall suspend a license of any horse owner, trainer, jockey, groom, stable foreman, exercise boy, veterinarian, etc., the license of said person shall be suspended pending a hearing of the board.
>
> Said licensee may request a hearing before the board within five days after receipt of notice of the action of the stewards, which hearing shall be held within seven days after such request has been received by the board unless the petitioner or his counsel shall request or agree to the commencement of the hearing at a later date.
>
> A request for hearing shall be in writing and shall specify with sufficient detail the asserted reasons why the stewards' ruling or recommendation is alleged to be incorrect, the names of witnesses expected to be called by the petitioner, and the name of his attorney if he chooses to be represented by counsel.
>
> A ruling or recommendation of the stewards shall be presumed correct and the election of a party who

> is the subject of the same to forego the appeal provided herein during the prescribed time period, may be considered by the board as a waiver of the rights here provided and an admission that said ruling or recommendation is correct and should be affirmed."

3. That plaintiff, by his attorney, requested a hearing, pursuant to the above-quoted rule, before the Illinois Racing Board, by letter dated November 25, 1974, and that a copy of said letter is attached hereto as defendant's Exhibit 2.

4. That defendants, by their attorney, and with proper notice, offered the plaintiff a hearing, pursuant to the above-quoted Rule No. 236a. A copy of the letter of counsel for the Illinois Racing Board, containing notice of said hearing, is attached hereto as defendants' Exhibit 3.

5. That plaintiff, by his attorney, informed counsel for the Illinois Racing Board that plaintiff would not be present at the hearing scheduled by the Illinois Racing Board. The letter of plaintiff's attorney is attached hereto as defendants' Exhibit 4.

6. Counsel for the Illinois Racing Board responded and that letter is attached hereto as defendants' Exhibit 5.

7. That neither plaintiff, nor his attorney, appeared at said hearing. That all of the above described exhibits 1 through 5 were submitted to the Illinois Racing Board on December 13, 1974, and a transcript of that hearing is attached hereto as defendants' Exhibit 6.

8. That plaintiff, through his attorney, requested that the Illinois Racing Board not schedule its hearing during the period of December 1 through December 6, 1974.

and that plaintiff filed this law suit on December 6, 1974.

9. That plaintiff, with the advice of counsel, failed to exhaust his administrative remedies.

10. That, as a result of the foregoing, plaintiff has voluntarily, knowingly, and intelligently waived his right to a hearing.

Wherefore, defendants pray that this court find, as a matter of law that:

1. Plaintiff has not been denied his right to due process;
2. Plaintiff is estopped from seeking equitable relief from this Honorable Court because Plaintiff, by his own actions, has prevented the defendant members of the Illinois Racing Board from taking any action in this matter.

And Further, defendants pray that this cause be dismissed and that costs and attorneys fees be assessed against the plaintiff.

SECOND AFFIRMATIVE DEFENSE

Now come the Defendants, and each of them, and as a second affirmative defense state as follows:

1. That as a result of Plaintiff's written request (as set forth in the letter of November 25, 1974, which is attached hereto as Defendants' Exhibit 2), defendants granted a stay of the stewards' decision which suspended plaintiff's license.

2. That the afore-mentioned administrative stay has remained in effect from on or about November 25, 1974, until the present time.

3. That there has been no thoroughbred racing in Illinois since November 22, 1974, and there will be no thoroughbred racing in Illinois until April 12, 1975.

4. That during the pendency of this litigation, the racing stewards at Oak Lawn Park, in Hot Springs, Arkansas called the Illinois Racing Board in order to inquire about the status of Plaintiff's license in Illinois and the Illinois Racing Board confirmed in writing to the Oak Lawn stewards that an administrative stay was in effect. Defendants' Exhibit 7.

5. That plaintiff has failed to show any harm to him as a result of the stewards' decision.

Wherefore, the defendants pray that judgment be entered in favor of the defendants and that costs and attorneys fees be assessed against plaintiff.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Thomas Vilet, being duly sworn, and on oath, states as follows:

1. That I am a Special Agent of the Illinois Bureau of Investigation.
2. That the facts contained in the attached investigative memorandum, IBI #74V1171, dated November 23, 1974, are true to the best of my knowledge and belief.

/s/ Thomas Vilet
Thomas Vilet

Subscribed to and sworn before me this fourth day of March, 1975.

/s/ Richard C. Mulder
Notary Public
My Commission Expires July 17, 1978

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

John Carsten, being duly sworn, and on oath, states as follows:

1. That I am a Special Agent of the Illinois Bureau of Investigation.
2. That the facts contained in the attached investigative memorandum, IBI #74V1171, dated November 23, 1974, are true to the best of my knowledge and belief.

/s/ John Carsten
John Carsten

Subscribed to and sworn before me this fourth day of March, 1975.
/s/ Jewel Noble
Notary Public

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Guy E. Vorsanger, being duly sworn, and on oath, states as follows:

1. That I am a Special Agent of the Illinois Bureau of Investigation.
2. That the facts contained in the attached investigative memorandum, IBI #74V1171, dated November 23, 1974, are true to the best of my knowledge and belief.

/s/ Guy E. Vorsanger
Guy E. Vorsanger

Subscribed to and sworn before me this fourth day of March, 1975.
/s/ Richard C. Mulder
Notary Public

ILLINOIS BUREAU OF INVESTIGATION
INVESTIGATIVE MEMORANDUM

IBI Number: 74V1171
Date: November 23, 1974
Subject: Walter D. Wilkey
Reporting Agent: J. Carsten — T. Vilet — G. Vorsanger

Purpose: To report the attempted inspection of the subject's vehicle and person at Sportsman's Park on November 22, 1974.

Date Dictated: 11/25/74
Date Typed: 11/26/74 By:nds
Case Agent: John Carsten

On November 22, 1974, pursuant to information received from Chief Chemist JOHN McDONALD, that the subject may be administering Apomorphine to horses, an attempt was made by this reporting agent, and two others, to conduct a search on the subject and his vehicle.

The subject was contacted at approximately 1530 hours at the Laramie Stable Gate on the backside of Sportsman's Park. The reporting agents identified themselves to the subject and informed him that they would like to conduct a search of his vehicle and person in conjunction with the Rules and Regulations of the Illinois Racing Board. Dr. WILKEY was advised that he did not have to allow agents to search the vehicle or his person. Dr. Wilkey was also advised that if he would not permit a search, he would have to appear before the Stewards

for a possible violation of Illinois racing rules. After protesting that he felt the Rules were a violation of his civil rights and an invasion of his privacy, the subject reluctantly agreed to allow the agents to search his vehicle — a 1973 Chevrolet 2dr, bearing Illinois 1974 license plates 136278. The subject opened the trunk of the vehicle and agents conducted a search for the drug Apomorphine. The search was conducted on track property. The subject was asked during the search if he would submit to a search of his person for any medication. Dr. Wilkey advised that he did not have any medication on his person; however, the subject then pulled his 1974 Illinois Racing Board Badge #0829 and a bottle of injectible medicine from his left hand coat pocket. Subject returned the items to the pocket before the agents could determine what the bottle contained. The subject then refused to allow the search of his person. Dr. Wilkey advised that he had personal items on his person and would not submit to a search. Agent Vilet advised Dr. Wilkey that the agents were only interested in any medication that he had on his person. Dr. Wilkey again stated that he would not allow a search of his person, and agent Vilet reiterated that all Dr. Wilkey had to do was to empty his pockets of any medication. Dr. Wilkey refused. Agents Vilet and Vorsanger accompanied the subject to the Hawthorne Stable area to treat a horse. Dr. Wilkey returned to the Sportsman's Park backside where he parked and secured his vehicle. Agents Vilet and Vorsanger escorted him to the judges stand at Sportsman's Park.

At approximately 1600 hours a Stewards Hearing was conducted by State Steward Ted Atkinson, H. Hauer, and Associate Steward H. H. Battle. The hearing resulted

in the issuance of Ruling #249, which called for the suspension of the subject, Dr. Walter D. Wilkey for refusal to comply with I.R.B. Rule #322, which refers to inspections and searches. The case is referred to the Illinois Racing Board for further action. A copy of Ruling #249 is attached to the report. Agent Carsten confiscated Dr. Wilkey's badge at the direction of Ted Atkinson.

Note: Dr. Wilkey kept his right hand in his right hand coat pocket during the hearing and when he would move, a noise came from his pocket. The noise sounded like glass bottles hitting one another.

EXHIBIT 1

No. 249

The National Jockey Club as agent for the Crusade of Mercy, Inc.
at Sportsman's Park
Cicero,
November 22, 1974

Dr. W. D. Wilkey, SS 318-36-3050 dob 8-7-42, Veterinary license No. 0829 is suspended for refusal to comply with I.R.B. Rule No. 322 (inspections and searches) and this case is referred to the Illinois Racing Board for any further action deemed appropriate. During the term of this suspension subject is denied privileges of all race track grounds under the jurisdiction of the I.R.B.

/s/ T. F. Atkinson
T. F. Atkinson State Steward
/s/ H. E. Hauer
H. E. Hauer State Steward
/s/ H. H. Battle
H. H. Battle Assoc. Steward

EXHIBIT 2

On the letterhead of:

MICHAEL B. COHEN
November 25, 1974

Honorable Anthony Scariano
Chairman, Illinois Racing Board
160 North La Salle Street
Suite 1000
Chicago, Illinois
Dear Mr. Scariano:

On behalf of Dr. W. D. Wilkey I am respectfully requesting a hearing before the Illinois Racing Board concerning his recent suspension by the track stewards for allegedly violating I.R.B. rule No. 322.

I would also request a stay of the track stewards ruling of suspension pending a further review of the matter.

Dr. Wilkey has informed me he will be out of town between December 1st-6th and December 21st-28th. If it is possible to have a hearing between the 6th and 21st of December it would be greatly appreciated.

Very truly yours,
/s/ Michael B. Cohen
Michael B. Cohen

MBC:sw

EXHIBIT NO. 3

On the letterhead of:

ILLINOIS RACING BOARD

December 11, 1974
Mr. Michael B. Cohen
100 North LaSalle St., Room 900
Chicago, Illinois 60602

Re: Steward's Ruling No. 249
Issued at Sportsman's Park, November 22, 1974

Dear Michael:
Pursuant to the request contained in your letter of 11/25/74, the Illinois Racing Board will hold a hearing on the above mentioned steward's ruling.

The charge against Dr. Wilkey is his alleged violation of Thoroughbred Rule No. 322.

Since all of the stewards present at the hearing are presently out of town, I intend to call, as my only witnesses, the following I.B.I. agents: Tom Villet, Guy Vorsanger and John Carsten.

The hearing will be held, before the full Board, on December 13, 1974, at 10:00 a.m. in Room 1015, 160 North LaSalle St., Chicago, Illinois.

Yours very truly,
Illinois Racing Board
/s/ Jewel
Jewel N. Klein
Counsel
JNK/jm
Delivered by messenger

EXHIBIT NO. 4

On the letterhead of:

MICHAEL B. COHEN
December 11, 1974

Illinois Racing Board
c/o Jewel Klein
Attorney at Law
160 N. La Salle St.
Chicago, Illinois

Re: Steward's Ruling No. 249
Issued to Sportsman's Park,
November 22, 1974

Dear Ms. Klein:

Pursuant to your letter to me dated December 11, 1974 informing me that the Illinois Racing Board will hold a hearing on December 13, 1974 at 10:00 A.M. with reference to the above captioned matter, please be advised of the following:

Dr. Wilkey and I will not attend the hearing for several reasons. 37c-4 (Chapter 8 Smith Hurd Illinois Annotated Statutes—pocket part) state that a hearing shall be held seven (7) days after such request has been received by the board. The Board's letter of December 11, 1974 does not comply with the above statute since I informed the Board on approximately November 25, 1974, of my desire of a hearing.

As you will recall, I had a conversation with you with reference to my desire to discuss this matter with Mr. Scariano and yourself before further legal action was taken. You informed me that "Tony did not want to meet me".

In view of the fact that a lawsuit has been filed in the Federal Court challenging the constitutionality of the Board's rule, I believe that that forum is the proper one, at this time, to determine this matter.

Very truly yours,
/s/ Michael B. Cohen
Michael B. Cohen

MBC/mc

On the letterhead of:

ILLINOIS RACING BOARD

December 12, 1974
Michael B. Cohen
100 North LaSalle Street
Suite 900
Chicago, Illinois 60603
RE: Dr. W. D. Wilkey

Dear Mike:

I have received your letter of December 11, 1974, and I shall present it to the Board at our hearing on Dr. Wilkey tomorrow.

I also intend to tell the Board that it is my opinion that your letter of November 25, 1974, constitutes a request for a continuance of the hearing and a waiver of any rights under Chapter 8, Section 37c-4.

Yours very truly,
Illinois Racing Board
/s/ Jewel
Jewel N. Klein
Counsel

JNK:jg

EXHIBIT 6

EXCERPT OF REPORT OF PROCEEDINGS AT THE REGULAR MONTHLY MEETING OF THE ILLINOIS RACING BOARD HELD ON FRIDAY, DECEMBER 13, 1974 AT 160 NORTH LASALLE STREET, ROOM 1010, CHICAGO, ILLINOIS.

Present:

Mr. Anthony Scariano,
Chairman;

Mrs. Jewel Klein,
Board Attorney;

Mr. William Masterson,
Secretary.

* * *

Chairman Scariano: Mr. Secretary?

Secretary Masterson: There is a hearing in the matter of Dr. Wilkey. Is Dr. Wilkey present or his attorney?

Chairman Scariano: Let me say this before we get into the matter of Dr. Wilkey, I have got a little bit of a louder voice than you have, Mr. Masterson.

Dr. Wilkey is not here, is that right?

(No response.)

Chairman Scariano: He is not here. Nobody appears as a representative of Dr. Wilkey?

Let the record show that neither Dr. Wilkey nor a representative in his behalf is here.

Now, Mrs. Klein?

Mrs. Klein: Mr. Chairman, on November 22, 1974 the stewards issued a ruling at Sportsman's Park, ruling

No. 249, suspending Dr. Wilkey for refusal to comply with IRB Rule No. 322. That is the rule pertaining to searches and inspections.

Chairman Scariano: Is that a thoroughbred or a harness rule?

Mrs. Klein: It is a thoroughbred rule. I have a packet. You can pass these out. I think a copy of the ruling is in the second page in this packet.

On November 25, 1974, I received a letter—well, the letter was addressed to Mr. Scariano, Chairman, on behalf of Dr. Wilkey requesting a hearing before the Board. That letter is also contained in that packet of information.

Chairman Scariano: Let's make this whole packet of information a part of the record at this point.

Mrs. Klein: I have the copies here and would like to mark the ruling as Exhibit 1 and the letter of November 25th from Michael Cohen, attorney for Dr. Wilkey to Chairman Scariano as Exhibit No. 2.

Chairman Scariano: All right. Let's make at this point in the record in the matter of Dr. W. D. Wilkey—W-i-l-k-e-y is it?

Mrs. Klein: No. It's my—I do not know, sir, the proper spelling of the name. His attorney has spelled it e-y and i-e.

Chairman Scariano: Well, that's close enough. Let the record show that the following are made exhibits in the record at this point:

The letter of December 12, 1974 addressed to Michael B. Cohen, Dr. Wilkey's attorney, sent by Mrs. Klein.

The next thing is the suspension. The next thing is the suspension of November 22nd, right?

Mrs. Klein: It is my intention to mark the suspension as Exhibit No. 1. It's incorrect in your packet.

The suspension will be No. 1. The letter of November 25th will be No. 2. The letter from me, as counsel to the Board, to Mr. Cohen dated December 11th will be Exhibit No. 3.

Chairman Scariano: All right.

Mrs. Klein: The letter on the same day, December 11th, from Mr. Cohen to me will be Exhibit No. 4, and my letter of December 12th, which is the first page on your packet, would be Exhibit No. 5.

Chairman Scariano: All right. Those five documents will be, in the order enumerated by Mrs. Klein, made a part of the record at this point.

(Said documents, so offered and received in evidence, marked Exhibits Nos. 1 through 5, inclusive, are returned herewith and made a part hereof.)

Mrs. Klein: If I may continue, in Mr. Cohen's letter of November 25th he requested a stay of the steward's ruling, and he also requested—informed me that Dr. Wilkey would be out of town between December 1st and December 6th, and he requested that a hearing be held between the 6th and the 21st of December.

On December 11th we delivered by messenger my letter marked Exhibit 3 informing Mr. Cohen that there would be a hearing at today's Board meeting on this matter; also informing him of the nature of the charge and who I intended to call as witnesses.

Mr. Cohen responded that same day, and I informed him in my letter of December 12th that I would include his letter of December 11th in this record.

There was an issue raised with regard to the statutory requirement that a hearing be held within seven days after a request had been received, and it is my

opinion that his letter of November 25th, the one that we have marked as Exhibit No. 2 asking that a hearing not be held during the first week in December, constitutes a waiver of that seven-day requirement.

Unfortunately, I haven't had the pleasure of meeting personally, Agents Villet, Vorsanger and Carsten. I cannot tell the Board whether or not they are here.

Secretary Masterson: They are here. They are in the office.

Chairman Scariano: Well, it seems to me that Mr. Cohen is picking his own dates for a hearing.

Commissioner Reum: Right.

Chairman Scariano: And then he ducks out. That is what we call in Italian "chupzpih."

"Dr. Wilkey has informed me he will be out of town between December 1st and 6th and December 21st and 28th. If it is possible to have a hearing between the 6th and 21st of December it would be greatly appreciated."

That is exactly what we are doing. We are giving them a hearing as he requested between the 6th and the 21st.

Mrs. Klein: Is it your pleasure, Mr. Chairman, that I proceed with the hearing?

Chairman Scariano: I don't think we should. I don't know how the Board feels about it, but I don't want to proceed in absentia. I think he ought to be here, but I think that we have made our record, that he asked for a hearing between the 6th and 21st of December. We are giving him his hearing between the 6th and 21st, unless my dates are all goofed up, and he is not here.

We will give him a hearing when he wants it. Get another date for him. We will give him a hearing.

Hasn't he started a suit in Federal Court on this?

Mrs. Klein: Yes, sir.

Chairman Scariano: On what basis?

Mrs. Klein: I don't have enough copies for all of you, but there has been a case filed in Federal Court assigned to Judge Bauer entitled Dr. W. D. Wilkey, Plaintiff, vs. The Illinois Racing Board, Anthony Scariano, et al, and The Illinois State Racing Stewards, Ted Atkinson, et al.

Chairman Scariano: He is attacking the constitutionality of the rule?

Mrs. Klein: That is correct.

Chairman Scariano: All right.

Mrs. Klein: And he also alleges that he didn't get a hearing before the Stewards.

Chairman Scariano: Yes. I would direct, with the approval of the Board, that counsel or the Attorney General, whoever handles this case, be instructed to move for a summary judgment on the basis of the record here, and the only issue then would be whether or not he did get a hearing from the Stewards.

Did he get a hearing from the Stewards?

Mrs. Klein: Of course.

Chairman Scariano: Then that takes care of that objection.

Mrs. Klein: I think the agents will testify that they asked Dr. Wilkey to empty his pockets of medication, if he had medication—

Chairman Scariano: I think all you need are affidavits from our officials and the IBI that he was given his hearing before the Stewards, and the only thing you have got then is the question of the constitutionality of the rule.

Mrs. Klein: That is correct.

Chairman Scariano: And I would also bring to the attention of the court that he asked for a hearing before this Board, and he was so interested in due process that he didn't show up on the date that he asked for; and I don't think we need to hold a hearing in absentia.

I am violently opposed to hearing cases without having before us the person accused. It smacks a little bit continental to me.

Commissioner Channick: May I ask, is the suspension still in effect? Has it been stayed?

Mrs. Klein: No, it has not.

Commissioner Channick: It doesn't state a term for the suspension? It is just an indefinite suspension, and that will remain in effect without further action by the Board?

Mrs. Klein: On the '74 license.

Secretary Masterson: Then comes '75. If he applies, the Stewards would probably decide then whether to issue a license or withhold from issuing a license.

Commissioner Channick: I would agree then, there is nothing we can do.

Chairman Scariano: He is not hurt in Illinois, but he can be hurt in other states?

Secretary Masterson: If the other states, other commissions honor our rulings, he cannot—

Chairman Scariano: I understand they do.

Mrs. Klein: We have not asked that any other state honor our ruling.

Secretary Masterson: Once a ruling is issued, other states—

Chairman Scariano: Mike Phelan is shaking his head.

Mr. Phelan: Suire went down racing in Louisiana.

BEST COPY AVAILABLE

Chairman Scariano: As of today he ain't.

Commissioner Reum: Yes, sir.

Chairman Scariano: So they honor our rules, our holdings, Mr. Phelan.

All right then. If it is okay with the Board, those are the instructions I would give counsel, that either she, or the Attorney General, whoever handles this case in court, move for a summary judgment showing that he had the requisite hearing by affidavits, that he had the requisite hearing that he is complaining he did not receive, that he asked for and got a hearing by this Board, but he refused to show up—at least he got a date for it.

And that leaves, I think, only the issue of constitutionality, and I think that we can scrub it until we have to deal with it again.

Is that all right?

Commissioner Hyman: Right.

Commissioner Channick: Yes.

Chairman Scariano: All right. Let that be the order of the Board then.

(Which were all of the proceedings had at said meeting concerning the above matter.)

APPENDIX D

ORDER

This matter coming on to be heard before the Honorable Judge William Bauer, on the motion of the Plaintiff, Dr. W. D. Wilkey, by and through his attorney, Michael B. Cohen, seeking a temporary restraining order restraining the Defendants from suspending Plaintiff's veterinarian's license, the Defendants, by and through their attorney, Jewel Klein, being present in open Court, and arguments having been heard by this Honorable Court.

It Is Hereby Ordered that the Illinois Racing Board and its agents and employees are hereby temporarily restrained from suspending the veterinarian license of Dr. Walter Wilkey until December 30, 1974, 10:00 A.M., for his alleged violation of Rule 322 of the Rules and Regulations of Horse Racing.

Enter:

Judge

Dated:

APPENDIX E

UNITED STATES DISTRICT COURT

• • (Caption—No. 74 C 3524) • •

MOTION TO EXTEND TEMPORARY RESTRAINING ORDER WITH MEMORANDUM OF LAW

Now comes the Plaintiff, Dr. W. D. Wilkey, by and through his attorney, Michael B. Cohen, and moves this Honorable Court pursuant to Rules 6 (b) and 65(b) of the Federal Rules of Civil Procedure to extend the temporary restraining order heretofore entered on December 19, 1974 and in support of said motion states as follows:

1. On December 19, 1974 your Honor entered a temporary restraining order against the defendants, restraining them from suspending Plaintiff's Veterinarian license, pending a hearing on Plaintiff's motion for a Preliminary Injunction which hearing was scheduled for December 30, 1974.

2. On December 27, 1974 Plaintiff's counsel agreed with Defendant's counsel that this matter should be heard by a three (3) judge court pursuant to Title 28 U.S.C., section 2281 and 2284 and filed a motion before your Honor requesting that a three (3) judge court be convened.

3. Your Honor stated that you would send the matter to Chief Judge Swygert but that a three (3) judge court could not be convened by December 30, 1974.

4. The same factors which prompted your Honor to grant the temporary restraining order on December 19, 1974 still exist.

The above facts are precisely the "good cause" as indicated in Rules 6(b) and 65(b) of the Federal Rules of Civil Procedure.

Wherefore, Plaintiff respectfully requests that your Honor extend the temporary restraining order heretofore entered until Plaintiff's motion for a preliminary injunction is ruled on.

MEMORANDUM OF LAW

Rule 6(b) and 65(b) of the Federal Rules of Civil Procedure state in essence that an order heretofore entered may be extended by the court, for "good cause". Rule 6(b) states that that the Court may do this at its discretion. Rule 65(b) states that the reasons for the extension shall be entered of record.

In Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir., 1970) the court stated that "a temporary restraining order in our jurisprudence contemplates a limited type of injunctive sanction of short duration... It is to be granted only until the court has an opportunity to pass upon the merits of a demand for preliminary injunction" (emphasis supplied). This court has not yet had the opportunity to pass upon the merits of Plaintiff's demands for a preliminary injuction.

In Brúno v. City of Kenosha, et al., 333 F.Supp. 726 (U.S. Dist. Ct. Wisc., 1971) vacated on other grounds 93 S.Ct. 2222 (1973) Chief Judge Reynolds on his own initiative requested a three (3) judge court. The judge insured the status quo until the three (3) judge court was convened by continuing his restraining order until further order of court.

CONCLUSION

It is abundantly clear that your Honor not only has the power but possibly the duty to extend the temporary restraining order heretofore entered until a court has the opportunity to pass upon the merits of Plaintiff's claim for preliminary injunction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. I previously granted Plaintiff's Motion for temporary restraining order on December 19, 1974, said temporary restraining order to expire on December 30, 1974 at which time I had scheduled a hearing on Plaintiff's motion for preliminary injunction.

2. I found no reason how the defendant's could be harmed by the entry of the temporary restraining order.

3. I further find no harm to the public.

4. I further find, based on representations of Plaintiff's counsel, that the Plaintiff would suffer irreparable harm if the temporary restraining order were not granted in that he would be foreclosed from practicing his profession at any race track in the United States.

5. I further find, without expressing a definitive opinion on Plaintiff's claims, a probability of success on the merits.

6. Rules 6(b) and 65(b) of the Federal Rules of Civil Procedure state that a temporary restraining order may be extended for good cause shown.

7. I find that "good cause" has been shown since counsel representing both Plaintiff and Defendants' believe that Plaintiff's motion for preliminary injunction should be heard by a three (3) judge court. This was

brought to my attention on December 27, 1974, three (3) days prior to the expiration of my temporary restraining order heretofore entered.

8. I further find that Plaintiff's complaint alleges a substantial constitutional question, requiring a resolution by a three (3) Judge District Court in accordance with Title 28, U.S.C., sections 2281 and 2284.

9. Since no court has had an opportunity to rule upon the merits of Plaintiff's claim, and will not be able to do so until after the expiration date of the existing temporary restraining order I find that factor to be "good cause" under rules 6(b) and 65(b) of the Federal Rules of Civil Procedure.

Enter:

Dated: Dec. 30, 1974

APPENDIX F

UNITED STATES DISTRICT COURT

* * (Caption—No. 74 C 3524) * *

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CONTENTION THAT RULE 322 OF THE ILLINOIS RACING BOARD IS UNCONSTITUTIONAL

Statement of Case:

On or about November 21, 1974, Plaintiff, a licensed veterinarian, refused to have his person searched. Because of this refusal, based on Rule 322 of the Racing Board, his license was revoked.

Rule 322 reads as follows:

Inspections and Searches Amended November 13, 1973.

a) The Illinois Racing Board or the State Steward investigating for violations of law or the rules and regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any rack track operator licensed by said Board: and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places

aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule shall have his license revoked.

b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

In Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 523 (1967) the Supreme Court held that a San Francisco Housing Code,[1] which authorized warrantless inspection

[1] Sec. 503, Right to Enter Buildings

"Authorized employees of the City departments or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the city to perform any duty imposed them by the Muncipal Code."

violative of the 4th and 14th Amendments to the United States Constitution since administrative searches by Municipal health and safety inspectors constitute significant instructions upon interests protected by the 4th Amendment i.e., authorizing a municipal official to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein.

It is interesting to note that Camara overruled Frank v. Maryland, 359 U.S. 360, 79 S.Ct. 804, yet the ordinance in Frank, unlike the rule of the Illinois Racing Board, was hedged with safeguards in that there was a general reasonableness requirement in Frank.[2]

In Camara, the argument was made (as it will be here) concerning the police powers of the state regulating the health, safety and morals is dependent upon the enforcement of the rule. The Supreme Court responded by stating:

> "But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant" (Camara v. Municipal Court, 387 U.S. 527, 533; 87 S.Ct. 1727, 1733).

The question is not whether the public interest justifies the type of search (or request in our case) in question but whether the authority to search should be evidenced by a warrant, which in turn depends in part whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See Sch-

[2] "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar, or enclosure, he may demand entry therein..." (Frank v. Maryland, 359 U.S. at 361, 79 S. Ct. at 806).

member v. California, 384 U.S. 757, 770, 771; 86 S.Ct. 1826, 1835-36.

In See v. Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967) which presented the question whether Camara was applicable to inspections of commercial structures the court stated that:

> "As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private Commercial property." (See v. Seattle, 387 U.S. at 543, 87 S.Ct. at 1739).

Likewise Dr. Wilkey has the right to practice his profession free from attempted unreasonable official entries upon his person. When the right to privacy must reasonably yield to the right of search is to be decided by a judicial officer and not by a policeman or government enforcement agent. Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369.

It is obvious to this writer that if Dr. Wilkey was doing anything wrong, or illegal, even based merely on suspicion, he would have been searched. This factor, among others, leads plaintiff to believe that the Supreme Court ruled, as it did, in United States v. Biswell, 406 U.S. 311, 92 S. Ct. 1593 (1972) and Colonade Catering Corp., v. United States, 397 U.S. 72; 90 S.Ct. 774 (1970). In Biswell, the warrantless search was made pursuant to a federal statute[3] authorizing official entry of any firearms or ammunition dealer for the purpose of inspecting or examining any records or documents required

[3] 18 U.S.C., Sec. 923(g)

to be kept or any firearms or ammunition kept or stored by such dealer.

In that context the inspection system is aimed at licensed dealers in firearms. The inspectors know that they will find records and/or guns and a close scrutiny of traffic in guns is of central importance in an effort to prevent violent crime and to assist the states in regulating firearms traffic. In fact, this finding was expressly made. See Congressional Findings and Declarations, note preceding 18 U.S.C. S922. Further inspection is crucial since it assumes that weapons are distributed through regular channels and in a traceable manner.

In Colonade Catering v. United States, 397 U.S. 72, 90 S.Ct. 774 (1970),[4] in addition to the broad historical authority for the Federal Government to regulate the

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[4] 26 U.S.C. S5146(b) Provides "The secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

(a) Entry During Day—26 U.S.C. S7906 provides "The secretary or his delegate may enter in the daytime, any building or place where any articles or objects subject to tax are made, produced or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night—"When such premises are open at night, the secretary or his delegate may enter them while so open, in the performance of his official duties.

liquor industry, the federal agent who was at a party on the petitioner's premises noted a possible violation of the federal law. Congress has the broadest of power to design such powers of inspection under the liquor laws and extreme power (not as much as in liquor) to inspect gun dealers. But that is a far different cry from an administrative rule proscribing a warrantless search. A warrantless search, which if refused, means revocation of one's license to practice his chosen profession.

What broad historical powers or legislative history can the defendants cite authorizing their right to intrude on one of man's most basic and sacred freedoms?

The former President of the United States, acting through the Attorney General of the United States, did not have the power to search without a warrant (tap a telephone), United States v. United States District Court, 407 U.S. 297, 92 S.Ct. 2125 (1972). Absent probable cause neither do narcotic agents, postal inspectors, secret service agents, police officers, and a myriad of others.

Defendants will rely heavily on a decision from a state appellate court in Pennsylvania, Lanchester v. Pennsylvania State Horse Racing Commission, 325 A.2d 648. That case is presently in the Pennsylvania Supreme Court on a Petition for Allowance to Appeal. Plaintiff respectfully suggests to this court that that decision should not be followed by this Court because that decision is simply wrong. That court carved a general rule out of what was intended to be a narrow exception to the 4th Amendment requirements when they stated:

> "Guidance on this permissible utilization of warrantless regulatory searches came for with in Colonade Catering Corp., v. U.S. 397 U.S. 72***. This accep-

ance of warrantless regulatory searches became full blown in United States v. Biswell, 406 U.S. 311".

The critical distinction overlooked by the court in Lanchester was that the searches in Biswell and Colonade were narrowly drawn, confined to dealers who are required to keep and maintain records required to be kept by them by federal regulation concerning guns and liquor themselves.

Rule 322 of the Illinois Racing Board is more comparable to a general search. There is no definable scope. Could it seriously be argued that absent probable cause the federal agents could have searched the person of the dealers in liquor or guns?

In Biswell and Colonade the regulations were aimed at the person likely to be violating the law. Here the rule is aimed at every licensee.

The regulations in Biswell and Colonade are further limited to the purpose of the license (a narrow aim more analogous to a specific search) and further authorize for a specific search for specific articles. Further in Biswell, if an agent finds and unregistered gun at a gun dealers that tells the government everything they have to know. Not so in the instant case. Dr. Wilkey, being a veterinarian, has a perfect right under certain circumstances, to have drugs in his possession that may fall within the category of a prohibited drug (he may be treating an ill horse at the track or have to go to one of the farms where race horses are kept when they are unable to race).

We respectfully urge this court to hold that the Supreme Court has carved out two narrow exceptions to the 4th Amendment. If one follows the reasoning of that Pennsylvania Appellate Court, we would have no more 4th Amendment in that there are a myriad of regulated

industries requiring licenses (transportation industry, utility industry, food industry, brokerage industry, legal and medical professions).

Rule 322 of the Illinois Racing Board has a further constitutional infirmity. Upon refusal to consent to a search, one's license is revoked. The Supreme Court has said, on numerous occasions, that to inflict a penalty on a person for asserting a constitutional privilege is violative of the 5th Amendment to the United States Constitution. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616 (1967); Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625 (1967); Gardner v. Broderick, 392 U.S. 173, 88 S.Ct. 1913 (1968); Lefkowitz v. Turley, 44 U.S. 70 (1973). A constitutional right should not be watered down by imposing the dishonor of revocation and the deprivation of a livelihood as a price for asserting it.

Gardner supra teaches us that a public employee (policeman) cannot be discharged for his refusal to waive a Constitutional Right (self incrimination). Likewise, Dr. Wilkey's license was revoked for his failure to relinquish, at the expense of job forfeiture, his 4th Amendment rights.

The Gardner rational was followed by the 7th Circuit in Confederation of Police v. Conlisk, 489 F2d 891 (7th Cir 1973) Cert den 94 S.Ct. 1971 (1974).

Wherefore, Plaintiff respectfully requests this Court to find Rule 322 of the Illinois Racing Board violative of the United States Constitution.

APPENDIX G

UNITED STATES DISTRICT COURT

* * (Caption—No. 74 C 3524) * *

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CONTENTIONS OR RULE NO. 322

Statement of Facts

In April of 1974, the Plaintiff, Dr. Walter D. Wilkey applied to the Illinois Racing Board (hereinafter sometimes referred to as the "Board") for a license which would permit him to practice his profession on race tracks regulated by the Board. Plaintiff had a license from the State of Illinois to practice veterinary medicine and that license is not at issue in this case.

A copy of plaintiff's license application is attached hereto as Defendant's Memorandum Exhibit No. 1.

The rule of the Board which is at issue in this case, namely Thoroughbred Rule No. 322, is set forth in its entirety on said application as is Plaintiff's written consent to be bound by that rule. Plaintiff's license application was approved and the license granted on or about April 12, 1974.

On November 22, 1974, three agents of the Illinois Bureau of Investigation believing that there was probable cause (see Affidavits of John Carsten, Tom Vilet, and Guy Vorsanger, attached hereto) attempted to search Dr. Walter D. Wilkey on the "backstretch"* at Sports-

* The "backstretch" is the area where the racing horses are stabled. Admission to the backstretch is strictly con-

man's Park Race Track.

Dr. Wilkey permitted the IBI agents to search his automobile, but refused to submit to a search of his person. Dr. Wilkey was then advised that the agents were only interested in any medication that Dr. Wilkey might have on his person. Dr. Wilkey again refused to permit a search.

The agents then accompanied Dr. Wilkey to the stewards' office. Dr. Wilkey was again asked if he would empty his pockets of medication. He was advised of his rights and of the consequences of his refusal, pursuant to Rule No. 322. Plaintiff again refused to permit the search and the stewards' suspended him.

The suspension powers of stewards are limited by Rule No. 25 which states:

> "The stewards may suspend for no greater period than the duration of the meeting plus 30 days, any-one whom they have authority to supervise. . ."

Since the day of the attempted search and the stewards hearing was November 22, 1974, and since that day was the last day of the thoroughbred racing season in Illinois, the suspension would have terminated automatically on December 22, 1974.

However, on November 25, 1974, Plaintiff, by his attorney, filed an appeal with the Illinois Racing Board (Defendants' Exhibit No. 2, attached to Defendants' Amended Answer). The letter requesting the appeal stated, in part:

* (Continued)

trolled and the only persons entitled to enter this area are employees of the Illinois Racing Board, employees of the race track operator, law enforcement officials, and other persons licensed by the Illinois Racing Board.

> "Dr. Wilkey has informed me he will be out of town between December 1st-6th and December 21st-28th. If it is possible to have a hearing between the 6th and 21st of December it would be greatly appreciated." (Defendant's Exhibit No. 2 attached to Defendant's Amended Answer)

On December 6, 1974, Plaintiff filed this lawsuit. On December 11, 1974, Plaintiff was notified (Defendants Exhibit No. 3, attached to Defendants' Amended Answer) that a hearing before the Illinois Racing Board would be held on December 13, 1974. Plaintiff, with the advice of counsel, refused to attend the Racing Board hearing. The Board, thus, has taken no action which would affirm or overrule the stewards' ruling.

On December 19, 1974, the Honorable Judge William Bauer issued a temporary restraining order staying the effect of the stewards' decision for 10 days. On December 30, 1974, the temporary restraining order was again extended and Judge Bauer ordered that "temporary restraining order extended until Plaintiff's motion for a preliminary injunction is ruled on."

No testimony has been taken from any witness in this case. Plaintiff's Second Amended Complaint requests a preliminary injunction. However, no verified application for a preliminary injunction has been made and no affidavits in support of such a request have been filed.

Plaintiff's license expired on December 31, 1974. Plaintiff's 1974 racing license has never been revoked by the Illinois Racing Board.

To date, the Illinois Racing Board has received only one inquiry regarding the status of plaintiff's license. And, as plaintiff's affidavit, filed on March 6, 1975, discloses, plaintiff was licensed in Arkansas within 3 days after applying for such a license.

I

This Court Should Abstain From Hearing this Case Because the Precise Issue Involved Here is Presently Being Heard on Administrative Review In the Circuit Court of Cook County, Illinois

During the 1974 thoroughbred racing season, agents of the Illinois Bureau of Investigation searched the tackroom and automobile of a horse trainer, Kenneth Paul Smith. As a result of finding prohibited medications and a hypodermic needle in the automobile, Mr. Smith was suspended by the racing stewards. The Illinois Racing Board affirmed the 30 day suspension.

Mr. Smith has filed a complaint for administrative review and has challenged the power of the Illinois Racing Board and its agent to conduct warrantless searches. He has also challenged the power of the Board to adopt Rule No. 322.

Under the circumstances, the federal court is presented with a classic example of a situation in which it should abstain from hearing a case until after the state courts have interpreted the relevant state law. As the Suprme Court said in Texas v. Pullman Co., 312 U.S. 496 (1941)

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication... The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." 312 U.S. at 500.

Federal courts, for the reasons articulated in Pullman, have traditionally postponed the exercise of jurisdiction when a federal judicial decision may be premature or unnecessary.

II

Rule No. 322 Is Capable of A Constitutional Construction of Sufficient Specificity and Therefore is Not Vague or Overly Broad

Plaintiff has not challenged the Board's power, pursuant to Ill. Rev. Stats., Chapter 8, Section 37k to promulgate Rule No. 322, but instead claims the rule to be vague or overly broad and therefore unconstitutional. The Rule can be construed within the limits of specificity suggested for such rules in United States v. Biswell, 406 U.S. 311 (1972), i.e. "the activity of the search is limited in time, place, and scope." Id at 315.

The limitation as to place, race track enclosure, is clearly set forth in the rule. The regulations in Biswell, supra, and Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) restrict time to "normal business hours." The normal business hours in racing in impliedly that time before, during, and after a racing meet. Rule No. 322 uses the phrases "at which a meeting is held" and "racing meeting." The term "racing meeting" is defined by statute, Ill. Rev. Stat. Ch. 8, Sec. 37c, and is limited to the hours between 12:00 o'clock noon and 12:00 o'clock midnight, and excludes Sundays. Thus, a reasonable time limitation exists in the rule.

Furthermore, the scope of the search involves only the licensed individuals and the areas of the track enclosure which they utilize. Clearly, then, the scope of the search is not a general one, as plaintiff argues. This rule does not authorize an agent of the Board to search the thousands of individuals who patronize the race tracks on a daily basis. The rule only authorizes searches of those licensed individuals who have selected the racing industry as a means of employment and who, through

the exercise of that employment, have access to the "evils at hand." Biswell, supra, at 314. See Chicago Division of the Horsemen's Benevolent and Protective Association v. Illinois Racing Board, 133 Ill. App.2d 386 (1971).

Finally, the subject matter of the search is limited in scope. The initial sentence of the rule limits the search to evidence of violations of "law or the Rules and Regulations of the Board." Since the Board has power to act only within the confines of its own governing statute, the "law" implied is clearly Chapter 8, Section 37a et. seq. This governing provision authorizes the Board to investigate only three basic areas of activities; books and records (Sec. 37a.10; Sec. 37c; Sec. 37j.1; Sec. 37k); drugs (Sec. 37h.1) and wagering (Sec. 37j).

Thus, Rule No. 322 specifically authorizes a search limited in scope to evidence of a violation in only those three areas. Therefore, clearly these activities are the only ones implied as violations of "law or Rules and Regulations" under Rule No. 322.

It is basic to the rules of statutory construction that where the validity of a statute (or administrative rule is attacked and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which would uphold the statute. U.S. v. Harriss, 347 U.S. 612. See also San Antonio, Independent School District v. Rodriguez, 406 U.S. 966, (1973) (a corollary rule which presumes constitutionality of act).

Since there is at least one reasonable interpretation which meets the requirements set forth in Biswell, supra, Rule No. 322 is not unconstitutionally vague or overbroad.

III

Rule No. 322 Clearly Falls Within the Parameters of Recent Supreme Court Case Law and Therefore Constitutionally Provides for a Warrantless Search

The most general holdings regarding administrative searches were laid down by the Supreme Court in Camara v. Municipal Court, 387 U.S. 523, (1967) and See v. City of Seattle, 387 U.S. 541, (1967). Plaintiff would read these cases as requiring a warrant prior to search under any and all administrative statutes or rules. To do so is to overlook the case history preceding these decisions and to minimize the Court's struggle to design a new type of probable cause warrant appropriate for an administrative search.

In the opinion preceding Camara, Frank v. Maryland 359 U.S. 360, (1959), the Court upheld a warrantless search of private property on the basis that the social purposes served by the search would be of greater value than the minor intrusion into the individual's privacy. Camara overruled the result in Frank because of a reappraisal of the balance of values in the context of housing code inspections. In Camara, the Court clearly indicated that it would decide the question of administrative searches on a case by case basis, implying that the balance of state and personal interests would have to be weighed in each instance.

In two subsequent cases, Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) and United States v. Biswell, 406 U.S. 311 (1972), the Court carved out of the generalities of Camara and See certain types of state interest situations where a warrant is not necessary.

In Colonnade, the Court dealt with the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. The federal inspec-

tors, without a warrant, and without the dealer's consent, forceably entered a locked storeroom and seized illegal liquor. Neither the majority opinion nor the dissent had any difficulty supporting a warrantless search under this statute in the absence of force. The majority held that force could be used after consent was denied only if a warrant was procured. The statute provided that a refusal by a dealer to consent could be sanctioned by a criminal prosecution and a $500.00 fine. The majority held that this sanction was the exclusive remedy available in the face of non-consent and that forceable entry without a warrant was not an alternative.

Absent force then, the statute itself was held to be the equivalent of a warrant rendering a search and seizure completely constitutional. The Colonnade opinion set out several factors justifying such an exception to the Fourth Amendment requirements: (1) Historically, the government has been given broad powers to regulate the liquor industry and has, in fact, closely regulated it; (2) those who enter into the business of dealing in liquor are presumed to be aware of this close regulation and, therefore, have a very limtied expectation of privacy with regard to their business activities; (3) the scope of the search was sufficiently limited by the terms of the statute.

In Biswell, the Court applied the reasoning of Colonnade to federal gun control legislation and inspections of the premises of weapons dealers. There the dealer specifically inquired of the inspector if he had a warrant. The inspector indicated that he did not, but that he was authorized by the statutory language itself. The dealer then consented to the search on that basis.

The Court noted that guns, like liquor, are strictly controlled. A gun dealer is required to maintain records of his sales and is chargeable with knowledge of the

applicable regulations. He has little expectation of privacy with regard to his records, his inventory, or his storage areas. The Biswell opinion introduced another factor which would have applied, as well as Colonnade, i.e., the burden which a warrant requirement would place upon the effectiveness of the inspection procedures. Proper enforcement of the gun control legislation required the utmost flexibility of time, scope, and frequency of inspection, all of which would be frustrated by ordinary warrant procedures. The statute was also sufficiently limited in time, place, and scope so that the possibilities of abuse were not of impressive dimensions.

The criteria of Colonnade and Biswell can be applied to Rule No. 322 in a straightforward fashion. Pari-mutual wagering on horse races is illegal in Illinois, except as authorized by the Horse Racing Act, Ill. Rev. Stat., Ch. 8, Sec. 37 et. seq. The Board has the broadest kind of administrative power. Ill. Rev. Stat., Ch. 8, Sec. 37a. Racing in Illinois is a privileged enterprise, a "practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it," and therefore a "legitimate subject for regulation or prohibition by the state." Chicago Division of the Horsemen's Benevolent and Protective Association v. Illinois Racing Board, 133 Ill. App. 2d 386 (1971). On these same bases, racing has been analogized to the business of selling liquor. Id.

Those who enter the business of horse racing, in whatever capacity, receive the same historical notice of close state regulation and control as do liquor and gun dealers. There can be little reasonable expectation of privacy from inspection while on the backstretch, where the horses are stabled, and on and about the business of racing.

As indicated above, the rule here is sufficiently specific in time, place and scope to limit the dimensions of possible abuse.

Of the criteria set out in Colonnade and Biswell, there remains the consideration of the burden which would be placed on statutory effectiveness if warrants were required. Here the need for warrantless searches is perhaps even stronger than in the gun and liquor situations.

The Racing Board is concerned primarily with the regulation of betting and the legitimacy of competition between the horses. The opportunities for violations are many and varied. Evidence of either illegal betting or illegal drugging of the horses is subject to quick removal or destruction. As the Biswell court stated:

> "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential."

The closest factual situation in the case law is Lanchester v. Pennsylvania State Horse Racing Commission, 325 A.2d 648 (1974). There the Court, construing a racing rule substantially similar to Illinois' Rule No. 322, applied the criteria of Colonnade and Biswell to conclude that even a forceable, warrantless search of a horse trainer's vehicle on racing grounds did not violate the Fourth Amendment.

The rule in Lanchester provided for an overall consent to such searches as a licensing requirement, but failed to provide a sanction for refusal of consent to a specific search. There is, thus, a factual distinction from Colonnade, but not, as plaintiff implies, a broadening of the Colonnade-Biswell rationale. The Pennsylvania Court, like the dissent in Colonnade and the majority in Biswell, merely take the Colonnade majority at its word. A warrant will be required before force

can be used only where another sanction for refusal to consent is set out in the statute.

Under the facts in this case, force is not an issue since no search took place. The question of procedures to be followed if and when force is contemplated need not be considered here and should not be allowed to cloud the more fundamental issue of the validity of the rule itself. Lanchester is not, as plaintiff argues, an extension of the Colonnade-Biswell rationale, but merely a straightforward application to the field of horse racing.

IV

A Warrantless Search of Plaintiff Would Have Been Proper On the Basis of Plaintiff's Prior Consent By License

Plaintiff, and every other licensee under the racing statutes, consented in writing to a search prusuant to Rule No. 322 as a part of his licensing application. The application form sets out the rule in its entirety and immediately above the space for the applicant's signature provides the following: "I further consent to be subject to the searches provided for in Thoroughbred Rule No. 322 and Harness Rule No. 25.19a." (Both rules are exactly the same).

As discussed above, racing in Illinois is a "privileged enterprise," subject to strict regulation and even prohibition. Investigative searches are a necessary adjunct of such regulation and control, and prior consent by license is reasonable in such an enterprise. The provision of Rule No. 322 is substantially similar to that in the federal statute considered in Colonnade. There the Court never had to reach the consent issue. However, both the majority and the dissenting clearly accepted the validity of prior consent by license and differed only with

respect to the sanction to be applied if the dealer refused consent to a specific search. A similar prior consent by written contract was held to be a valid waiver of amendments rights. Zap v. U.S. 328 U.S. 624 (1946), reversed on other grounds 330 U.S. 800 (1947).

The Illinois Supreme Court has upheld prior consent by license in the liquor industry, a similar "privileged enterprise." Daley v. Berzanskis, 47 Ill.2d 395 cert. den. 402 U.S. 999 (1971). Other jurisdictions have upheld prior consent by license in the regulated fields of real estate, State Real Estate Comm. v. Roberts, 441 Pa. 159 (1970), cert. den. 402 U.S. 905 (1971) and even horse racing. Lanchester, supra.

Once given, valid consent cannot be effectively rescinded in the face of a specific request to search. "(A)fter voluntary consent, the attempted recession... does not render the original consent involved for the reason that at a latter time the defendant realized that his acquiescence might incriminate him." U.S. v. Holmes 452 F.2d 109, 111 (7th Cir. 1972). That case validated the effect of prior consent in a criminal proceeding, surely a more difficult situation than the civil matter at issue here.

V

Rule No. 322 Is Not Unconstitutional Merely Because It Provides a Sanction For Failure to Consent to a Specific Search

The Supreme Court, in Camara and See, in weighing the state interests at stake against those of the individual, was justifiably concerned with a criminal sanction was applied if consent to the search was not given. However, validity of the sanction provision in this Fourth Amendment context did not actually come before the

Court except as a factor in weighing the interests.

As indicated above, neither the majority nor the dissenting opinion in Colonnade questioned the validity of the fine which might have been imposed for the failure to consent. The majority, in fact, held such a fine to be not only a proper sanction, but the exclusive sanction for failure to consent. By clear analogy, under the facts here, the suspension or revocation of a license is a clearly acceptable sanction.

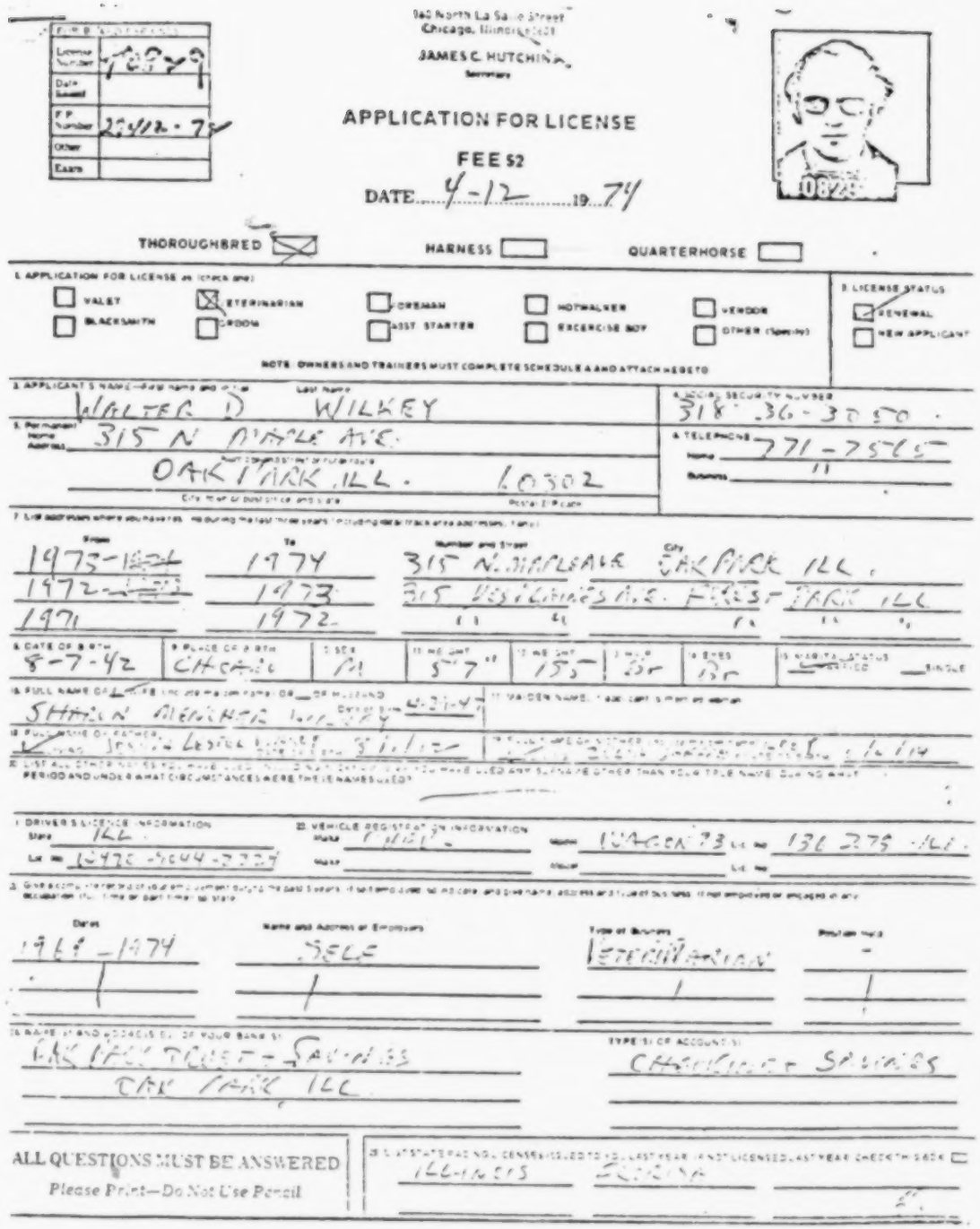
The cases which plaintiff cites to support a claim if unconstitutionality where a sanction is applied for assertion of a constitutional privilege are all cases dealing with Fifth Amendment privileges. The Fifth Amendment privilege is intrinsically different from the Fourth, and an extension of the reasoning of Garrity v. New Jersey, 385 U.S. 493, (1967); Spevack v. Klein, 385 U.S. 511, (1967), and Gardner v. Broderick, 392 U.S. 273, (1968) would be improper. However, even in the Fifth Amendment cases, the existence of such a sanction provision does not render the underlying the statute or rule unconstitutional, but merely requires authorities to choose between possible sanctions and subject the individual to no more than one of them. Under the facts here, plaintiff was not put to any unfair choice of sanctions so that even the extension of the Fifth Amendement cases would be inapplicable to the facts here.

Conclusion

For all of the foregoing reasons, this court should find that Rule No. 322 is constitutional.

EXHIBIT 1

This is to certify that the attached is a true and accurate copy of the 1974 Application for License of Walter D. Wilkey on file with the Illinois Racing Board.



140 North La Salle Street
Chicago, Illinois 60601
JAMES C. HUTCHINS
Secretary

APPLICATION FOR LICENSE

FEE $2

DATE 4-12 19 74

THOROUGHBRED ☒ HARNESS ☐ QUARTERHORSE ☐

1. APPLICATION FOR LICENSE as (check one)
☐ VALET ☒ VETERINARIAN ☐ FOREMAN ☐ HOTWALKER ☐ VENDOR
☐ BLACKSMITH ☐ GROOM ☐ ASST. STARTER ☐ EXERCISE BOY ☐ OTHER (Specify)

2. LICENSE STATUS ☒ RENEWAL ☐ NEW APPLICANT

NOTE: OWNERS AND TRAINERS MUST COMPLETE SCHEDULE A AND ATTACH HERETO

3. APPLICANT'S NAME (First name and initial) WALTER D (Last name) WILKEY
4. SOCIAL SECURITY NUMBER 318-36-3250
5. Permanent home address 315 N MAPLE AVE.
OAK PARK ILL. 60302
6. TELEPHONE (Area code) 771-7562 (Number)
7. List all positions held during the past three years (including present) and all additional names used.

From	To	Number and Street	City
1973-1974	1974	315 N. MAPLE AVE	OAK PARK ILL.
1972-1973	1973	315 VERNON AVE. APTS	OAK PARK ILL
1971	1972	" "	" "

8. DATE OF BIRTH 8-7-42 | 9. PLACE OF BIRTH CHICAGO | 10. SEX M | 11. HEIGHT 5'7" | 12. WEIGHT 155 | 13. EYES BR | 14. HAIR BR | 15. MARITAL STATUS (Married, Single, Widowed, Divorced) SINGLE
16. FULL NAME OF WIFE (Use maiden name) OR HUSBAND SHARON MEISNER 6-21-74
17. MAIDEN NAME
18. Full name of father JOHN SR. & LESTER Birthplace 3/1/12
Full name of mother [illegible] Birthplace [illegible]
19. List all other names you have used or by which you have been known, including maiden name, nicknames, aliases, and any name change other than your true name. Give dates and explain. If additional space is needed, attach separate sheet. Indicate period and under what circumstances were the names used.

20. DRIVER'S LICENSE INFORMATION
State ILL
No. 1297S-5044-2324
21. VEHICLE REGISTRATION INFORMATION
State ILL
No.
Year 1973 Make VOLVO No. 136 275 ILL.
State
No.
22. Give complete information as to all automobile traffic tickets you have received in the last three years, including those received in other states. If additional space is needed, attach separate sheet. (Use "none" if applicable.)

Date	Name and Address of Employer	Type of Business	Position Held
1969-1974	SELF	VETERINARIAN	-
1	1	1	1

23. NAME AND ADDRESS OF YOUR BANK
LAKE TRUST & SAVINGS
OAK PARK, ILL.
TYPE(S) OF ACCOUNT(S)
CHECKING & SAVINGS

ALL QUESTIONS MUST BE ANSWERED
Please Print—Do Not Use Pencil

25. LIST STATE(S) YOU CONSIDERED TO BE A RESIDENT LAST YEAR AND LICENSED LAST YEAR (CHECK EACH ONE)
ILLINOIS ☐ FLORIDA ☐ [illegible] ☐

BEST COPY AVAILABLE

IF THE ANSWER TO ANY OF QUESTIONS 26-33 IS "YES," GIVE COMPLETE DETAILS BELOW

5/22/72 - 6/1/72 SUSPENDED FOR "FALSIFICATION OF INFORMATION WITH THE STATE VETERINARIAN"

(ATTACH ADDITIONAL SHEET IF NECESSARY)

26. Have you ever been licensed in any state under any other name? YES☐ NO☒ If YES, list in the space provided to the left the names and dates used and identify the state and the year.

27. Has your license (or your wife's or husband's license, if any) ever been denied, suspended or revoked in this or any other racing jurisdiction? YES☒ NO☐

28. Have you ever been found guilty of any fraud or misrepresentation in connection with racing or breeding? YES☐ NO☒

29. Have you ever been ruled off, suspended or discharged from any race track by any racing official, association, or commission? YES☒ NO☐

30. Have you ever been expelled or ejected from or denied the privileges of a race track? YES☒ NO☐

31. Have you or any member of your immediate family (as ever been employed by or associated with a bookmaker or any gambling or bookmaking establishment or (b) ever associated socially or a handbook or other illegal establishment? YES☐ NO☒

32. Have you ever had any permit or license of any type denied, suspended or revoked by any federal, state, or local governmental agency? YES☐ NO☒

33. Have you ever been (1) arrested or indicted, (2) plead guilty, plead nolo contendere, been found guilty, or been convicted, or (3) forfeited bail or been fined for any criminal offense other than felony or misdemeanor, except traffic violations other than driving under the influence of intoxicating liquor? YES☐ NO☒

(TO BE ANSWERED BY VETERINARIAN AND HORSEMEN APPLICANTS ONLY)

34. I HAVE BEEN LICENSED BY THE STATE OF ILLINOIS FOR THE YEAR 19 71 LICENSE NO 6 3694 THE LICENSE IS STILL IN FULL FORCE IF NOT, GIVE REASONS _____

AN INDICTMENT OR INFORMATION HAS A N E VER BEEN RETURNED OR COMPLAINT MADE AGAINST ME BY THE UNITED STATES OR STATE OF _____ CHARGING PURCHASE SALE USE OR POSSESSION OF NARCOTICS (OTHER THAN _____)

INSPECTIONS AND SEARCH: By (a) recognized Illinois (b) Illinois State Police (c) [illegible]

a. The Illinois Racing Board and its representatives, including Racing Officials and Illinois State Police, shall have the power to perform inspections and searches at any time of the premises and vehicles of any licensee, and of other places where horses are kept or where horses are entered to race or are raced, or where any race meeting is held, and of any property in the possession of any licensee which is used in connection with the operation of any race meeting, and to distribute their duties and direct the work of the State Police assigned to duty at any race meeting. Any licensee in possession of such premises, vehicles, or property shall upon demand admit any member of the Illinois Racing Board, any Racing Official, any State Police officer, or any other person authorized by the Board to make such inspection, and shall permit such person to make such search thereof as he may desire. By accepting his employment and each license, every applicant and licensee consents to such inspections and searches and does thereby expressly waive any and all claims against the Board, its members, officials and employees for trespass or other tort in virtue of any action taken or duty performed pursuant to this Rule.

b. The Illinois Racing Board, its members, employees, representatives, agents, and any Racing Official, any Illinois Racing Board Steward or Assistant Steward, the Illinois State Police Division of Horse Racing, any State Police officer assigned to duty at any race meeting, any law enforcement agency having jurisdiction over any race meeting, and any Special Agent of the Illinois Department of Law Enforcement assigned to the Illinois Racing Board, and the Chief Investigator shall have the authority to conduct investigations concerning all matters within the jurisdiction of the Illinois Racing Board.

Right Thumb Print

I hereby certify that I have read and understand the foregoing rules and regulations governing horse racing in Illinois and that all statements made in this application are true and correct to the best of my knowledge and belief. I further agree to abide by the rules and regulations as promulgated by the Illinois Racing Board. I understand that any false statements or omissions in this application may be sufficient cause for denial or revocation of any license issued hereon. I further agree to submit to such reasonable tests as may be required by the Illinois Racing Board or its representatives as a condition precedent to the granting of a license. I further agree to permit the Illinois Racing Board or its representatives to enter upon any premises in which any horse which I own or have in my custody or control is quartered or kept, and to permit the Illinois Racing Board or its representatives to examine any such horse and to secure such samples or specimens of blood, urine, or other bodily substance as the Board may request. The undersigned hereby irrevocably constitutes and appoints the Illinois Racing Board as his attorney to request, demand, receive and sue for any sample or specimen of blood, urine, or other bodily substance of any horse which I own or have in my custody or control, which sample or specimen may be required by the Board or its representatives, and I hereby release the Illinois Racing Board from any liability whatsoever in connection with any test performed upon any such sample or specimen. I further consent to the jurisdiction of the Illinois Racing Board and its representatives over me and over any horse which I own or have in my custody or control, and I further agree to be bound by the decisions of the Board or its representatives concerning the eligibility for racing of any such horse.

Signature of Applicant

—HARNESS APPLICANTS ONLY—

Subscribed and sworn to before me this _____ day of _____ 19____

_____

Notary Public

I hereby certify that I have read the above application and that to the best of my knowledge and belief all statements made therein are true and correct.

_____

Signature of Veterinarian

_____

Signature of Horseman

STATE OF ILLINOIS
DEPARTMENT OF REGISTRATION AND EDUCATION
ILLINOIS RACING BOARD

COMMITTEE TO THE ILLINOIS RACING BOARD

DATE 5/-12 19 72

TRACK S.P.

WE, THE UNDERSIGNED, Members of the LICENSE COMMITTEE created by the Illinois Racing Board,

do hereby recommend to the Illinois Racing Board that [illegible] be granted a license

as _____ for the year 19 72

_____

_____

I do hereby DISSENT to the above recommendation, and vote against the recommendation that such License be granted by the ILLINOIS RACING BOARD.

_____

_____

APPENDIX H

UNITED STATES DISTRICT COURT

* * (Caption — No. 74 C 3524) * *

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES
(Filed—April 2, 1975)

1. Notice is hereby given that Dr. W. D. Wilkey, Plaintiff herein, hereby appeals to the Supreme Court of the United States from the order entered on March 12, 1975, denying his motion of preliminary injunction, dismissing the complaint, and finding that Rule 322 of the Illinois Racing Board is Constitutional.

2. This appeal is taken pursuant to 28 U.S.C., Section 1253.

Michael B. Cohen
100 North LaSalle—Room 900
Chicago, Illinois
Attorney for Plaintiff Appellant

I hereby certify that I personally served a copy of the above Notice of Appeal to the Supreme Court of the United States to Mrs. Jewel Klein, 160 North LaSalle Street, Chicago, Illinois, Attorney for all of the Defendants on April 2, 1975.

Michael B. Cohen
100 North LaSalle—Room 900
Chicago, Illinois
Attorney for Plaintiff Appellant

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

No. 74-1553

In the

Supreme Court of the United States

OCTOBER TERM, 1974

DR. W. D. WILKEY.

Appellant,

vs.

THE ILLINOIS RACING BOARD, ANTHONY SCARIANO, Chairman,

HERBERT CHANNICK, RAY FREEARK, LUCY REUM, PATRICIA HEWITT, SIDNEY HYMAN,

Appellees,

and

THE ILLINOIS STATE RACING STEWARDS, TED ATKINSON, Chief Steward, HENRY HAUER, Steward, PETE BATTLE, Steward,

Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM DECISION OF A THREE JUDGE FEDERAL PANEL

JEWEL N. KLEIN
Attorney for Appellees
160 N. LaSalle Street, Room 1000
Chicago, Illinois 60602
(312) 793-3110

Assisted by
BRUCE LEVINE
Law Student, University of Chicago Law School

MICHAEL JACKSON
Chicago-Kent College of Law, J.D. '75

The Scheffer Press, Inc. (312) 263-6850

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1553

DR. W. D. WILKEY,

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Appellees,

and

THE ILLINOIS STATE RACING STEWARDS, TED ATKINSON, Chief Steward, HENRY HAUER, Steward, PETE BATTLE, Steward,

Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM DECISION OF A THREE JUDGE FEDERAL PANEL

The decision below was a straightforward application of existing case law and thus does not present a substantial question which would require further argument.

Since the "Question Presented" and the "Statement" in Appellant's Jurisdictional Statement are misleadingly presented, we will restate the question, the facts, and the issues, in order to put this case in its proper context.

Question Presented

Is an administrative rule, which gives a state racing board power to search its licensees without a warrant, permissible under the Fourth and Fourteenth Amendments of the United States Constitution?

Statement of Facts

In April of 1974, the Appellant, Walter D. Wilkey, D.V.M., applied to Appellees, Illinois Racing Board (hereinafter sometimes referred to as the "Board") for a license which would permit him to practice his profession on race tracks regulated by the Board. Appellant has a license from the State of Illinois to practice veterinary medicine and that license is *not* at issue in this case. What is at issue is Appellant's license to practice veterinary medicine at race tracks where pari-mutuel wagering is conducted.

The rule of the Board which is at issue in this case, namely Thoroughbred Rule No. 322, states:

Inspections and Searches

a) The Illinois Racing Board or the State Steward investigating for violations of law or the rules and regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are

kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permited by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforsaid and waive and release all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment and each vendor who is permited to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule shall have his license revoked.

b) The Illinois Racing Board delegates the authority to conduct inspections and searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, to assist the Chief Investigator in his duties.

This rule is set forth in its entirety on the license application as is Plaintiff's written consent to be bound by that rule. Plaintiff's application was approved and the license granted on or about April 12, 1974.

On November 22, 1974, three Special Agents of the Illinois Bureau of Investigations, assigned to the Racing Board, attempted to search Dr. Wilkey on the "back-

stretch"* at Sportsman's Park Race Track, in Cicero, Illinois. This occurred at 3:30 p.m. while races were in progress.

Dr. Wilkey permitted the IBI agents to search his automobile, but refused to submit to a search of his person. Dr. Wilkey was then advised that the agents were only interested in any medication that he might have in his pockets. Dr. Wilkey again refused to permit a search.

The agents then accompanied Dr. Wilkey to the stewards'** office. Dr. Wilkey was again asked if he would empty his pockets of medication. He was advised of his rights and of the consequences of his refusal, pursuant to Rule No. 322. Appellant again refused to permit the search. No search of Appellant occurred. The stewards' then suspended him.

The suspension powers of stewards are limited by Illinois Racing Board, Rules and Regulations of Horse Racing (Thoroughbred) Rule 25 which states:

> "The stewards may suspend for no greater period than the duration of the meeting plus 30 days, anyone whom they have authority to supervise. . . ."

Since the day of the attempted search and of the stewards' hearing was November 22, 1974, and since that day was the last day of the thoroughbred racing season

---

*The "backstretch" is the area where the racing horses are stabled. Admission to the backstretch is strictly controlled and the only persons entitled to enter this area are employees of the Illinois Racing Board, employees of the race track operator, law enforcement officials, and other persons licensed by the Illinois Racing Board.

**The Thoroughbred Racing Stewards, also Appellees in this case, are the umpires or referees of horse racing.

in Illinois, the suspension would have terminated automatically on December 22, 1974.

However, on November 25, 1974, Plaintiff, by his attorney, filed an appeal with the Illinois Racing Board. The letter requesting the appeal stated, in part:

> "Dr. Wilkey has informed me he will be out of town between December 1st-6th and December 21st-28th. If it is possible to have a hearing between the 6th and 21st of December it would be greatly appreciated." (Defendants' Amended Answer, Exhibit 2, Jurisdictional Statement pg. 30a).

On December 6, 1974, Appellant filed this lawsuit, naming two sets of defendants, the Board and the stewards. On December 11, 1974, Appellant was notified (Defendants' Amended Answer, Exhibit 3, Jurisdictional Statement, pg. 31a) that a hearing before the Illinois Racing Board would be held on December 13, 1974. Appellant, with the advice of counsel, did not attend the Board hearing. Because Appellant was not present, the Board took no action to either affirm or overrule the stewards' ruling.

On December 19, 1974, the Honorable Judge William Bauer of the U.S. District Court for the Northern District of Illinios issued a temporary restraining order staying the effect of the stewards' decision for 10 days. On December 30, 1974, the temporary restraining order was again extended and Judge Bauer ordered the "temporary restraining order extended until Plaintiff's motion for a preliminary injunction is ruled on."

Appellant's license expired on December 31, 1974. Thus, the Appellees, the Illinois Racing Board and its members have never revoked Appellant's racing license and

Appellees, the Thoroughbred Racing Stewards, never had the power to revoke his license.

On March 12, 1975 oral argument was had before a three-judge federal panel consisting of the Honorable Luther M. Swygert, Judge, United States Court of Appeals, Seventh Circuit; the Honorable Richard B. Austin and the Honorable Alfred Y. Kirkland,* Judges, United States District Court, Northern District of Illinois, Eastern Division. Discussion was limited to the constitutionality of Rule 322. The panel found that the rule was constitutional in the light of recent Supreme Court decisions in the area of administrative searches. The motion for a preliminary injunction was denied and the case dismissed.

Discussion in Support of Motion

To review the history of warrantless administrative searches, we must begin with *Frank* v. *Maryland,* 359 U.S. 360 (1959). In that case, this Court upheld a warrantless search provision of a municipal housing code and found the ordinance reasonable because the social purposes served by the search outweighed the costs of the minor intrusion into an individual's privacy.

Camara v. *Municipal Court,* 387 U.S. 523 (1967) overruled the result in *Frank* because of a reappraisal of the balance of values in the context of housing code inspections. However, *Camara* clearly indicated that the ultimate standard of the Fourth Amendment was reasonableness. *Id.* at 539. The Court noted that it would decide the

*This case was originally assigned to Judge William Bauer and was transferred to Judge Kirkland when Judge Bauer was appointed to the Seventh Circuit Court of Appeals.

question of administrative searches on a case by case basis, implying that the balance of state and personal interests would have to be weighed in each instance.

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, *which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.*" (Emphasis added). Id. at 533.

Camara dealt with the search of a private home. *See* v. *City of Seattle,* 387 U.S. 541 (1967) extended the holding in *Camara* to the search of a private business office by fire inspectors.

In the context of municipal code inspections, evidence of violations is not readily concealable or destructible. No legitimate governmental purposes would be frustrated by the requirement of obtaining a warrant. In *Camara,* this Court recognized that a warrant serves two functions: it is a safeguard against pretextual invasions of the privacy of the home; and it serves to inform the individual of the authority of the inspector. *Camara* at 532-3.

In the two subsequent cases, *Colonnade Catering Corp.* v. *U.S.,* 397 U.S. 72 (1970) and *United States* v. *Biswell,* 406 U.S. 311 (1972), this Court dealt with administrative situations in which the balance of social benefit versus protection of individual privacy was considered and, in both instances the court determined that a warrant was not necessary. *Colonnade* dealt with the statutory authorization for warrantless searches of the business premises

of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant, and without the dealer's consent, forceably entered a locked storeroom and seized illegal liquor. Neither the Court's majority nor the dissenters had any difficulty upholding the Congress' authority to provide for warrantless searches in this context. The majority construed the penalty provision to be the exclusive remedy, under the statute, for failure to submit to a warrantless search, while the dissenters interpreted the penalty provision as a remedy supplemental to that of forcible entry.

The *Colonnade* opinion justified the absence of a warrant in the liquor regulation context while distinguishing it from the situations present in *Camara* and *See. Colonnade* at 75. This Court noted that the government has been given broad powers to regulate the liquor industry and to protect the revenue derived thereby from various types of fraud. The history of strict regulation of the liquor industry is such that those who enter it cannot reasonably expect the type of deference to their privacy within their business establishments which is due the citizen within the private confines of his home or the businessman within the privacy of his personal office.

Biswell extended the reasoning of *Colonnade* to federal gun control legislation and searches of the premises of weapons dealers. This Court noted that strict regulatory control of the gun industry, like the liquor industry, is in the public interest. A gun dealer is required to maintain records of his sales and is chargeable with knowledge of applicable regulations. When the dealer chooses to engage in the heavily regulated gun industry he has little justifiable expectations of privacy. Unlike the home dweller in *Camara,* the gun dealer is not left to wonder about the authorization or purposes of the search. Unlike building code violations, evidence of violations of the gun regulations are readily destructible or concealable. Proper enforcement of the gun control legislation requires the utmost flexibility in time, scope and frequency of inspection, all of which would be frustrated by ordinary warrant procedures.

Appellees freely concede that appellant is correct in his observation that the horse racing industry is not the liquor industry, nor is horse racing the same as gun dealing. However, the proper question is whether the reasons which make warrantless searches a proper part of the regulation of the liquor and gun industries are also applicable to the horse racing industry.

The criteria of *Colonnade* and *Biswell* can be applied to Rule No. 322 in a straightforward fashion. Parimutuel wagering on horse races is illegal in Illinois, except as authorized by the Horse Racing Act, Ill. Rev. Stat., Ch. 8, Section 37 et.seq. The Board has the broadest kind of administrative power. Ill. Rev. Stat., Ch. 8, Section 37a. As with the liquor industry, the horse racing industry, with its associated activity of gambling, is the type of enterprise which requires strict regulation to prevent corruption, *People* v. *Monroe,* 349 Ill. 270, 280 (1932), and to safeguard the state's interest in revenue. *People ex rel. Scott* v. *Illinois Racing Board,* 54 Ill. 2d 569, 301 N.E. 2d 285 (1973).*

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*It is interesting to note that state courts have often used liquor cases as precedent for racing cases. Some examples are: *Brennan* v. *Illinois Racing Board,* 42 Ill. 2d 352, 247 N.E. 2d 881 (1969); *Desert Turf Club* v. *Board of Supervisors of Riverside County,* 141 Cal. App. 2d 446, 296 P. 2d 882 (1956); *Madden* v. *Queen's County Jockey Club,* 296 N.Y. 249, 72 N.E. 2d 697 (1947); *State Racing Comm.* v. *Latonia Agricultural Assoc.* 136 Ky. 173, 123 S.W. 681 (1909).

Those who enter the business of horse racing receive the same historical notice of close state regulation and control as do liquor and gun dealers. There can be little reasonable expectation of privacy from inspection while on the backstretch of a race track. Indeed the search rule here in question is printed in its entirety on Racing Board license application forms.

In *Colonnade* and *Biswell,* this Court also considered the burden which would be placed on regulatory effectiveness if warrants were required In racing, the need for warrantless searches is perhaps even stronger than in the gun and liquor situations.

The Racing Board is concerned primarily with the regulation of betting and the legitimacy of competition between the horses. The opportunities for violations are many and varied. Evidence of either illegal betting or illegal drugging of the horses is subject to quick removal or destruction. As this Court stated:

> "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Biswell* at 316.

This reasoning applies, with equal force, to the regulation of horse racing. Unlike the situations in the liquor and gun industry, evidence of drugging violations can be entirely concealed upon the person of the violator.

At the same time, the administrative contexts considered in *Camara* and *See* contrast sharply with the liquor and gun industries and with horse racing. Evidence of housing and building violations are not readily concealable or destructible. The individual who is subjected to building code searches is unlikely to be aware of

existence and scope of the governments' authority to search absent the presentation of a warrant and he has a time-honored, and justifiable expectation of privacy.

Surely Judge Swygert, in announcing the decision of this case in the court below, was correct in saying:

> ". . .The principle and rationale of Colonnade and the Biswell cases, decided by the Supreme Court of the United States, are controlling; that the fact that one dealt with a liquor dealer's regulation and the other a gun dealer's regulation and this deals with the regulation of horse racing, that that is a difference without any distinction." (Appellant's Jurisdictional Statement at pg. 15a).

Conclusion

For all of the reasons stated above, Appellees submit that this case presents no substantial question of constitutional law. The decision of the lower court should, therefore, be summarily affirmed.

Respectfully submitted,

JEWEL N. KLEIN
Attorney for Appellees